Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

THE BANKRUPTCY ESTATE OF ULPIANO UNANUE-CASAL,
a/k/a CHARLES UNANUE,
Petitioner,

v.

GOYA FOODS, INC., JOSEPH A. UNANUE,
FRANK UNANUE, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of New Jersey

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PETITION FOR A WRIT OF CERTIORARI

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February 1, 1999

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QUESTIONS PRESENTED

1. Whether the supremacy clause requires the application of 48 U.S.C. § 733a to a resident of Puerto Rico, thus establishing his or her legal status as a citizen of Puerto Rico?

2. Is New Jersey obligated, by the full faith and credit clause of the United States Constitution, to give effect to the Civil Code of Puerto Rico as it relates to its laws of forced inheritance, conjugal partnership and illicit contracts?

3. Whether the courts below violated the due process clause of the fifth or fourteenth amendment when they entered judgment against petitioner declaring that Charles Unanue had no right to inherit from his mother's estate, despite the fact that petitioner's claim had never been pleaded or been subject to discovery?

PARTIES TO THE PROCEEDING

The parties to the proceeding below were Petitioner the bankruptcy estate of Ulpiano Unanue-Casal, a/k/a Charles Unanue * and Respondents Goya Foods, Inc., Joseph A. Unanue and Frank Unanue, Trustees under the Trust Agreement dated November 16, 1970, as amended by and among Prudencio Unanue, Joseph Unanue and Anthony Unanue, as Trustees of Sixteen Trusts Thereunder, and the beneficiaries of said trusts, Carol Ann Unanue-Freeboarg, C. Jeffrey Unanue, Robert Unanue, Mary Ellen Yorio, C. Randall Unanue, Joseph F. Unanue, Thomas Unanue, Mary Carmen Norris, Mary Ann Unanue, Mary Louise Unanue, Theresa Elizabeth Devir. Francisco R. Unanue, Mary Isabel Unanue, Carlos A. Unanue, Anne Marie Unanue, Peter Unanue, Andrew Unanue and Jorge Unanue.

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* This petition is filed for review of the decisions and judgments entered against the bankruptcy estate of Charles Unanue. Charles Unanue will file a separate petition for review of the duplicate judgment entered against him individually while under the protection of the Bankruptcy Code.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of New Jersey issued on November 5, 1998 and the decisions below.

OPINIONS BELOW

The judgment of the Supreme Court of the State of New Jersey entered on November 5, 1998, denying Petitioner's petition for certiorari has not been reported and is reprinted in the appendix hereto, p. 1a, *infra*. The

order of the Appellate Division, New Jersey Superior Court, denying Petitioner's petition for rehearing entered on July 16, 1998 has not been reported and is reprinted in the appendix hereto, p. 13a, *infra.*

The opinion and judgment of the Appellate Division filed on May 19, 1998 is reported at 311 N.J. Super. 589 (App. Div. 1998), and is reprinted in its original form in the appendix hereto, p. 3a, *infra.*

The opinion of the Chancery Division of the New Jersey Superior Court entered on November 19, 1993 is reprinted in the appendix hereto at p. 128a. The Order of the Chancery Division, dated November 19, 1994, is reprinted in the appendix hereto at p. 178a. The Opinion of the Chancery Division, dated March 28, 1994, is reprinted in the appendix hereto at p. 181a. The Opinion of the Chancery Division, dated February 23, 1995, is reprinted in the appendix hereto at p. 200a. The Judgment And Reference to Special Master of the Chancery Division, is reprinted in the appendix hereto at p. 214a. The Final Judgment of the Chancery Division, dated February 23, 1995, is reprinted in the appendix hereto at p. 211a.

An abridged version of the opinion and order of the Honorable Martin L. Kole, New Jersey Superior Court, entered on December 4, 1991 is reported at 255 N.J. Super. 362 (Law Div. 191), and a complete version is reprinted in the appendix hereto, p. 14a, *infra.* The Order of Judge Kole, dated December 4, 1991, is reprinted in the appendix hereto at p. 222a.

JURISDICTION

On appeal, Petitioner asserted at pages 47 through 52 of its principal brief in appeal number A-3915-94T3 that the Supremacy Clause of the United States Constitution and 48 U.S.C. § 733a required that the court below deem Prudencio Unanue to be a citizen of Puerto Rico at the time of his death so as to bind him and his estate to the

laws of Puerto Rico governing inheritance. It further asserted at pages 53 through 67 of the same brief that it was entitled to be fairly apprised of the claims and issues to be tried and it was denied this right with respect to the trial court's rendition of judgment regarding the estate of Carolina Unanue. These matters were further addressed and preserved in the reply brief at pages 51 through 55 and pages 55 through 71. The Appellate Division of the Superior Court of New Jersey affirmed the orders below "substantially for the reasons stated" by the judges below, and did not address the issue of the lower court's violation of the Supremacy Clause nor the issue of the denial of due process by rendering a decision with respect to the estate of Carolina.

On petition to the New Jersey Supreme Court, the issues of the Supremacy Clause and full faith and credit were presented at pages 3, 7, 8, 14 and 20 but the New Jersey Supreme Court declined to review.

The jurisdiction of this Court to review the opinion and judgment of the New Jersey Supreme Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

48 U.S.C. § 733a. Citizens; residence in island of citizens of United States.

> All citizens of the United States who have resided or who shall after March 4, 1927 reside in the island for one year shall be citizens of Puerto Rico.

U.S. Const. Article IV, Section 1.

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved and the Effect thereof.

U.S. Const. Article VI, Clause 2.

> The Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every States shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. amendment V.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a present or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offences to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amendment XIV, Section 1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 1738.

> The Acts of the legislatures of any State, Terrtiory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of that court that the said attestation is in proper form.
>
> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

STATEMENT OF THE CASE

In 1921, Prudencio Unanue ("Prudencio") and Carolina Casal ("Carolina"), both citizens of Spain, were married in Puerto Rico without a prenuptial agreement thus creating, under the laws of Puerto Rico and Spain, a legal partnership of gains and acquests known as a conjugal partnership. In 1936, Prudencio and Carolina founded an ethnic oriented wholesale food business in New York with funds provided by Carolina's inheritance. That family business eventually evolved into Goya Foods, Inc. ("Goya") and its affiliated companies (Goya and its affiliates are referred to collectively as the "Goya Companies").

Prudencio and Carolina's oldest son, Charles Unanue ("Charles"), served as Goya's Chief Operating Officer from 1947 to 1969. Since mid-1969, Charles has been engaged in an epic, bitter and all encompassing dispute with his father and brothers arising out of Charles' exposure of a massive tax fraud scheme perpetrated by his brothers involving unreported Goya profits of approximately $3,000,000.[1] The dispute has been litigated in vari-

[1] His father and brothers also schemed to defraud Augusto Falero, Prudencio's incapacitated, illegitimate son, of his forced inheritance under the laws of Puerto Rico.

ous forums throughout the United States and Puerto Rico and, since 1987, has focused exclusively on Charles' claim to inherit his share of his parents' estates as well as his claims to a 24% ownership interest in the Goya Companies that the Civil Code of Puerto Rico has been consistently ignored by New Jersey's state courts despite its applicability to the disputes between the parties. These claims are currently valued by Charles to be in excess of $300,000,000.

Prior to 1969, Charles, his father and his brothers were the shareholders, officers and directors of Goya and Charles and his brothers were the shareholders, officers and directors or partners of the Goya affiliated companies. However, in June 1969, after Charles' public disclosure of his brothers' tax fraud scheme, his father and brothers voted to discharge him as an officer, director and employee of the Goya Companies. Thereafter, extensive litigation ensued.

As a result of Charles' disclosure, Goya paid federal income taxes, interest and fraud penalties on approximately $825,000 of unreported profits. The litigation was settled by an agreement dated June 9, 1972 ("1972 Agreement") between Charles and the Goya Companies. The 1972 Agreement was executed and performed in Puerto Rico. Pursuant to its terms, Charles' ownership of approximately 24% of the Goya Companies was to be sold in an initial public offering to take place within two years. Charles retained the right to buy up to 75% of the offering at a maximum of 75% of $4,500,000.

In 1973, Charles learned that the Goya Companies and his brothers breached the 1972 Agreement by canceling the 1,250 non-voting shares of Goya owned by Caribbean Canneries, Inc., a Goya affiliated company, which substantially reduced his potential revenue from the public offering. As a result, Charles served a notice of default and Goya filed suit in New York for a judgment declaring that no default had taken place.

The declaratory judgment action was settled by the execution of an amendment to the 1972 Agreement dated

July 31, 1974 ("1974 Amendment") between Charles and the Goya Companies. It was executed and performed in Puerto Rico. Neither Prudencio nor Carolina were parties to the 1974 Amendment.

Pursuant to the 1974 Amendment, Charles agreed to: (1) the cancellation of the 1,250 non-voting shares of Goya; (2) the cancellation of the public offering; (3) a waiver of his future inheritance from his father; (4) restrictions on any interest in the Goya Companies he might obtain or inherit in the future from others; and (5) a penalty clause of twice the attorneys fees and costs to be paid by any signatory of the 1974 Amendment that loses an action against any other signatory on any matter ("Penalty Clause").

Prudencio died in 1976. During the last five years and four months of his life, he resided in and did not leave Puerto Rico. As a consequence, under 48 U.S.C. § 733a, Prudencio was a citizen of Puerto Rico, bound by its Civil Code, including the laws of forced heirship and those governing conjugal partnerships. Charles estimates that the value of Prudencio's estate prior to his death, which included the fair market value of an undivided one-half interest in voting control of Goya, was in excess of $100,000,000. Control of Goya constituted effective control of all of the Goya affiliated companies. The executors of his father's estate were Respondents Joseph A. Unanue and Frank Unanue, Charles' then surviving brothers. They reported their father's estate for federal and state tax purposes to be valued at approximately $1,350,000.

Carolina died in 1984, after an uninterrupted residence in Puerto Rico of 13 years. As a result, Carolina was also a citizen of Puerto Rico by virtue of 48 U.S.C. § 733a. Upon her death, Charles inherited one fourth of her estate pursuant to the express terms of her will. Her estate included an undivided one-half interest in the fair market value of voting control of Goya. Charles estimates that the value of his mother's estate at her death was more

than $200,000,000. Her executors, Respondents Joseph A. Unanue and Frank Unanue, reported her estate for federal and state tax purposes to be approximately $30,000. Charles never received his distribution from the executors.

Upon the marriage of Charles' parents, Prudencio and Carolina, a *sui geneis* legal partnership of gains and acquests known as a conjugal partnership was created under the laws of Puerto Rico and Spain. The conjugal partnership continued in existence throughout their marriage and, under the Civil Code of Puerto Rico, owned all of the assets earned or acquired during the marriage, irrespective of the location of the assets or the spouses or changes in their nationality. As such, upon Prudencio's passing, Carolina statutorily became the owner of one-half of the accumulated wealth of the conjugal partnership, including the fair market value of one-half of the majority of the voting stock of Goya. By statute, Charles was entitled to receive one-fifth of Prudencio's estate and was entitled to receive one-fourth of Carolina's estate upon her demise. It is the state court's refusal to recognize this legal fact and principle of Puerto Rico law that necessitates this petition.

In 1987, Charles discovered that his waiver of his right to inherit from his father's estate was void under the laws of Puerto Rico, the jurisdiction in which Charles was born and was a citizen from 1962 to 1997, in which the 1974 Amendment was executed and performed and of which his father was a citizen of by virtue of 48 U.S.C. § 733a. Accordingly, Charles served a demand upon his brothers for his fair and just share of both estates.

In response to Charles's demand, the executors commenced an action in New Jersey seeking a declaratory judgment that Charles was not entitled to inherit from his father. Shortly thereafter, Charles commenced an action in Puerto Rico seeking his inheritances from his parents and aunt, all of whom he contended died citizens in Puerto Rico by virtue of 48 U.S.C. § 733a.

In 1988, Charles filed a complaint in Puerto Rico contesting the validity of the 1972 Agreement as amended by the 1974 Amendment. Thereafter, Goya continued the jurisdictional war, after the Puerto Rico Superior Court had taken exclusive jurisdiction on the matter, by filing a complaint against Charles as an intervenor in the New Jersey action seeking a declaratory judgment that the agreements were valid. Goya sought such a declaration in New Jersey despite the fact that under the Civil Code of Puerto Rico, the agreement was void *ab intio*.

On August 29, 1990, Charles filed a voluntary petition for bankruptcy in the United States District Court for the District of Puerto Rico. On October 29, 1990, Goya and Goya de Puerto Rico, Inc., successor to Goya affiliates Puerto Rico Food Products Corporation and Caribbean Canneries, Inc., filed voluntarily proofs of claim in Charles's bankruptcy proceeding. The original proof of claim filed by Goya sought an "estimated" $4,000,000 for attorneys fees based upon the Penalty Clause. The original proof of claim filed by Goya de Puerto Rico, Inc. sought an "estimated" $2,000,000 for attorneys fees based upon the Penalty Clause as well. Their amended proofs of claim increased their "estimated" claims to $15,000,000 and $5,000,000, respectively.

Charles and the bankruptcy trustee objected to all of the proofs of claim on various grounds including the fact that the Penalty Clause upon which the claims were based was void as against the public policy of Puerto Rico and that the 1974 Amendment was void by its own specific reverse savings clause because it could not be substantially enforced.

On February 6, 1991, the bankruptcy court modified the automatic stay to permit the New Jersey court to conclude the plenary hearing to determine the domicile of Prudencio, but denied the motion by Respondents to lift the stay on the remaining aspects of the New Jersey action, which had not yet commenced. Immeditaely there-

after, the bankruptcy trustee was substiuted for Charles as the only party-defendant in the New Jersey action.

On September 24, 1991, the bankruptcy court consolidated the objection to the proofs of claim with a fraudulent transfer adversary proceeding and directed that Charles file the objection as a permissive counterclaim in that action. The counterclaim also reasserted Charles' claims to his inheritances and the invalidity of the 1974 Amendment.

On December 4, 1991, the New Jersey court issued an opinion concluding that Prudencio was domiciled in New Jersey notwithstaning 48 U.S.C. § 733a which provides that "[a]ll citizens of the United States who have resided [in Puerto Rico] for one year shall be citizens of Puerto Rico." The trial court concluded, without analysis or explanation, that this binding federal statute had no "relevance" to the case, despite Prudencio's unquestioned and uninterrupted freely chosen residence in Puerto Rico during the last five and one-third years of his life. The court's opinion addressed no other issue other than Prudencio's domicile.

Respondents responded to this decision by again asking the bankruptcy court to lift the automatic stay to permit the New Jersey action to proceed without submitting new evidence. On May 15, 1992, the motion was denied and, thereafter, the movants appealed to the district court. On August 3, 1993, the district court reversed.

Respondents then filed a summary judgment motion in the New Jersey action which sought to: (1) declare Charles in breach of the 1974 Amendment; (2) enforce the Penalty Clause in the 1974 Amendment which Goya had claimed, in the bankruptcy case, entitled it to $15,000,000, as being twice its legal expenditures made in litigation for the personal benefit of its controlling shareholders; (3) declare that Charles had no right to claim an interest in either Prudencio's or Carolina's estate; and (4) declare the 1972 Agreement and the 1974

Amendment valid and enforceable. Respondents sought these declarations even though Charles' claim to his mother's estate had not been filed in the New Jersey probate proceeding, where her executors had certified that she was domiciled in Puerto Rico, and no discovery had been conducted on the complicated factual issues underpinning Goya's effort to enforce the agreements.

The bankruptcy trustee, as predicted by the bankruptcy court judge as a ground to deny the vacating of the automatic stay, did not appear in opposition to the motion. Charles' application to the bankruptcy court to represent and defend the bankruptcy estate was denied. Therefore, no party appeared in the New Jersey action to defend the estate. Although the court and Respondents recognized that Charles was not a party, the court ordered Charles to participate in the proceedings and he did so until the court refused to confirm that, as a non-party, he could not be held liable for Respondents' legal fees.

The Honorable Arthur J. Lesemann, J.S.C., granted Respondents' summary judgment motion. He found Charles in breach of the 1974 Amendment and then modified and enforced the Penalty Clause entering $6.9 million judgments against both the bankruptcy estate and Charles, individually, despite having found that Charles' inheritance waiver, which was void as a renouncement of a future inheritance under Puerto Rico law, was the principal objective of the 1974 Amendment, and binding precedent establishing that the 1974 Amendment was "void" and "unenforceable" not only under the laws of Puerto Rico but also under the laws of New Jersey and New York. Equally remarkable, the court declared that Charles had no right to assert a claim to Carolina's estate under any theory because of his waiver of his inheritance from Prudencio. In so doing, it refused to recognize the Civil Code of Puerto Rico governing forced heirship and conjugal partnership and thus violated the full faith and credit clause of the United States Constitution, as well as the undisputed and unambiguous will of Carolina.

The bankruptcy case was dismissed by the bankruptcy court in September 1997 on the basis that it was a no asset case and that there were no creditors other than a non-dischargeable alimony claim, the effect of which was to deny recognition to the proofs of claim of Goya and Goya de Puerto Rico, Inc. and the $6.9 million judgments of the New Jersey court.

The Appellate Division affirmed the trial court decisions. It held that Prudencio's alleged New Jersey domicile mandated the application of New Jersey law to all issues arising in the case, including the validity of the 1972 Agreement and 1974 Amendment, even though Prudencio was not a party ot the 1974 Amendment. It also affirmed the reformation of the otherwise illegal Penalty Clause, contrary to every reported decision in New Jersey and New York, the chosen jurisdiction in the 1974 Amendment, to circumvent the binding family laws of Puerto Rico.

To deny Charles his bequest, the Appellate Division ignored the partnership laws of the Civil Code of Puerto Rico and, instead, applied conflicts of law principles arising in community property states.[2] Utilizing these inapposite standards, the court held that the date of acquisition of the questioned assets was the dispositive factor. In so doing, the court ignored the fundamental distinction between community property and partnership property, namely, the fact that conjugal partnership, as all legal

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2 By so doing, the Appellate Division failed to recognize that a conjugal partnership is, unlike a marriage consummated in a community jurisdiction, a separate legal entity whose public policy was the protection of the wife and, after 1976, is the protection of both spouses. In this regard, the civil law governing Conjugal Partnership when it was created in 1921 and until 1976, provided: "The wife shall obey her husband and follow him wherever he elects to live." (31 LPRA Sec. 283). Without equal ownership of the Conjugal Partnership assets, a homemaker has the status of an indentured servant.

partnerships, are separate judicial entities. As a partnership of gains, it is the owner of all assets acquired by its constituent members. To avoid this principle, the Appellate Division rendered the extraordinary opinion that New Jersey does not "recognize" the Civil Code of Puerto Rico which enacted the conjugal partnership system after being granted the authority to do so by the United States Congress in 1902. In other words, it refused to give full and faith and credit to the valid laws of Puerto Rico. Its decision is legally unprecedented.

REASONS FOR GRANTING THE WRIT

I. THE SUPREMACY CLAUSE AND THE FULL FAITH AND CREDIT CLAUSE OF THE CONSTITUTION PRECLUDE THE ENTRY OF THE JUDGMENT BELOW

The courts of New Jersey have disregarded two fundamental precepts of the Constitution, and in doing so they have encroached upon what Congress has carefully established with respect to the relations among Puerto Rico, the United States, and the 50 States. In disregarding those constitutional precepts, the decisions of the courts below decide important federal questions (*i.e.*, the effect of the Supremacy Clause and whether Full Faith and Credit is to be afforded to Acts of the government of the Commonwealth of Puerto Rico) in ways which conflict with the application of those principles by other courts which have had cause to address them. The decisions of the courts below also decide an important federal question (*i.e.*, the effect to be afforded Congress' statutory declaration of the establishment of Puerto Rican citizenship by residence in the island for a year or more) which has not been, but should be, addressed by this Court. For these reasons alone, the petition for a writ of certiorari should be granted. *See*, Supreme Court Rule 10.

Among other violations of the Constitution, the courts below have disregarded the Supremacy Clause. Article VI, Clause 2 provides:

> This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

In the decisions below, the courts wholly disregarded a number of Laws of the United States which, if applied, would have required a different outcome. The foremost federal law which was contravened by the courts below is 48 U.S.C. § 733a.[3] That statute provides, unambiguously, in its entirety:

> All citizens of the United States who have resided or who shall after March 4, 1927, reside in the island for one year shall be citizens of Puerto Rico.

The facts necessary for the application of this statute exist beyond dispute. Prudencio became a naturalized U.S. citizen in 1946. After November 1970, he continuously resided in Puerto Rico without leaving for five years and four months. By operation of this federal statute, Prudencio became a citizen of Puerto Rico and was there-

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[3] 48 U.S.C. § 733a was enacted into law in 1927 on the recommendation of the Governor of Puerto Rico, its legislature and the Committee on Insular Affairs of the House of Representatives which, after the rejection of HR 11610 of April 26, 1926 requiring 3 years of "domicile" in Puerto Rico as the basis for Puerto Rican citizenship, favorably considered HR 11846 of May 5, 1926 making U.S. citizens citizens of Puerto Rico after one year of "residence"—irrespective of the settled concept of domicile which requires the intention to continue residing there for an indefinite period. The unambiguous language of the legislation, particularly in light of the clear awareness of Congress with respect to the use of "residence" rather than "domicile," cannot be disputed. H.R. 11846 was approved, and it amended the Organic Act of Puerto Rico by adding Section 5a. It was codified as 48 U.S.C. 733a.

after subject to its laws, the obligations and limitations arising from Puerto Rican citizenship, and the public policies of that Commonwealth. The legislative history of this 48 U.S.C. § 733a is clear in expressing the intent that *residence* in Puerto Rico, rather than being domiciled in Puerto Rico, for a year or more confers Puerto Rican citizenship. Compare, Chapter 503 of the Public Laws of the Sixty-ninth Congress, March 4, 1927 (". . . who have resided or who shall hereafter reside in island for one year or more") with H.R. 11610 of the Sixty-ninth Congress ("permanently domiciled in the island for 3 years").

The concept of citizenship incorporates the concept of domicile. *See, Rodriguez-Diaz v. Sierra-Martinez*, 853 F.2d 1027, 1029 (1st Cir. 1988); *Unanue v. Caribbean Canneries, Inc.*, 323 F. Supp. 63, 67 (D. Del. 1971); *Trustees of Princeton University v. Trust Co. of New Jersey*, 22 N.J. 587, 595, 127 A.2d 19 (1956). By virtue of the statutory designation of Prudencio as a citizen of Puerto Rico, 48 U.S.C. § 733a, Prudencio's domicile thereby became Puerto Rico [4] such that the Puerto Rican laws governing forced heirship [5] and conjugal part-

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[4] In the hierarchy of a person's relationship with a jurisdiction, mere residence in a locality is the lowest form of relationship—constituting a transient form of relationship which is readily changed by the simple expedient of the person relocating himself. The next higher relationship is that of domicile, a relationship that requires more permanence and which arises from an objective manifestation of intent to make one's abode in that jurisdiction for an indefinite period of time. The highest form of relationship is that of citizenship, which entails the establishment of reciprocal social and political rghts and obligations between the individual and the jurisdiction which may continue despite a change in the person's residence. It is this highest form of relationship which this statute created between Prudencio and Puerto Rico.

[5] Under the law of Puerto Rico, an agreement by an heir such as Charles to renounce or compromise a future inheritance is prohibited. See, 31 L.P.R.A. §§ 2362, 2370. Similarly, a parent is prohibited from disinheriting a natural child. 31 L.P.R.A. § 2367.

nerships [6] became applicable even under the "domicile theory" used by the courts below.[7]

Moreover, regardless of whether Prudencio was domiciled in Puerto Rico, Puerto Rico's laws relating to family rights and obligations, or to the status, condition and legal capacity of persons, are binding upon the *citizens* of Puerto Rico although they reside in a foreign country. 31 L.P.R.A. § 10. Hence, the real determniation of consequence in this matter is whether Prudencio became a citizen of Puerto Rico. Under 48 U.S.C. § 733a, he did. The courts below refused to recognize the supremacy of that federal statute.

Congress, in balancing the relations between the United States and the Commonwealth of Puerto Rico, has determined that by virtue of *residence* in Puerto Rico for a year or more (not by virtue of a change of domicile), a U.S. citizen such as Prudencio becomes a citizen of Puerto Rico. Congress has further determined, in its balancing of the relations between the United States and the Commonwealth of Puerto Rico, that the government of Puerto Rico shall have the authority to legislate with respect to all matters of a legislative nature which are not locally inapplicable. 48 U.S.C. § 821. The laws of Puerto Rico and the laws of Congress thus emanate from the same

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[6] Under Puerto Rican law, the assets of married persons are held by separate legal entity known as the conjugal partnership. 31 L.P.R.A. § 3641. See also, *Mercado-Vega v. Martinez*, 666 F. Supp. 3, 7 (D.P.R. 1986); *Fernandez-Cerra v. Commercial Life Insurance Co. of Newark*, 344 F. Supp. 314, 316 (D.P.R. 1972).

[7] The effect of Puerto Rico's laws regarding forced heirship and the conjugal partnership is to protect the interests of children of a Puerto Rican citizen (such as Augusto Falero, the natural son of Prudencio, and Charles, Prudencio's first born "legitimate" son) and the interests of the conjugal partnership (an entity created pursuant to 31 LPRA § 3551 on the day of Prudencio's marriage in Puerto Rico to Carolina and thereafter existing pursuant to that statute). These basic attributes of Puerto Rican citizenship, however, were abrogated by the courts below.

sovereignty. *People of Puerto Rico v. Shell Oil Company*, 302 U.S. 253, 264, 58 S.Ct. 167, 172, 82 L.Ed. 235 (1937).

In the context of the present matter, Puerto Rico's laws regarding forced heirship and the conjugal partnership do themselves emanate from the same sovereignty that gives rise to federal laws. The Puerto Rican statutes regarding forced heirship and the conjugal partnership, as well as Puerto Rico's statute making the laws regarding family obligations applicable to all of its citizens, are within the purview of the legislative power which Congress has conferred upon the Puerto Rican government. Thus, upon the duly enacted authority of Congress, residence in Puerto Rico alone for the requisite time confers Puerto Rican citizenship upon U.S. citizens, and such citizenship subjects and binds the individual and his estate to the laws of Puerto Rico regarding family rights and obligations.

Had the courts of New Jersey given supremacy to 48 U.S.C. § 733a and to Congress' delegation of its legislative authority to the government of Puerto Rico, the courts would have been required to conclude that Charles is entitled to an inheritance from Prudencio of one-fifth of his estate under the forced heirship laws of Puerto Rico (and, had the issue been before the courts below, that Charles became entitled to an inheritance from Carolina consisting of a one-fourth share of one-half the value of the property of the conjugal partnership of Prudencio and Carolina under the conjugal partnership laws and Carolina's will, as well as one-fourth of Carolina's other properties).

However, the courts below refused to recognize the supremacy of the federal law conferring Puerto Rican citizenship, and refused to recognize the supremacy of the results of the exercise of federal legislative power which Congress conferred upon the government of Puerto Rico. The consequenecs of such a refusal are significant. In 1902, Congress passed the Foraker Act which adopted

the Civil Code of Spain (the laws that had been in force for the government of Puerto Rico prior to the surrender of Spain in the Spanish American War of 1898) as the governing law of Puerto Rico as well as the Philippines. Congress also conferred on Puerto Rico a number of attributes akin to those possessed by states.[8] The relationship which Congress constructed between Puerto Rico and the United States is like no other relationship. *Examining Board of Engineers, Architects And Surveyors v. Flores De Otero*, 426 U.S. 572, 596, 96 S.Ct. 2264, 2278, 49 L.Ed.2d 65 (1975). While conferring only certain selected attributes that are similar to those possessed by states, and by adopting the Civil Code of Spain as the controlling body of civil law, it is apparent that the creation of a unique relationship with respect to Puerto Rico was intended by Congress. The decision of the courts below has wholly destroyed that carefully crafted status of Puerto Rico, and the full faith and credit that must be given in each State to the public acts, records and judicial proceedings and to the contracts and judicial entities created under its laws and reduced that relationship to one where Puerto Rico is not afforded the full faith and credit that is its due under Congress' determination that certain

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[8] While Puerto Rico is not technically a state, its status is most closely analogous to that of a state: it has a constitution of its own (48 U.S.C. §§ 731b-731e), its inhabitants and citizens constitute a body politic (48 U.S.C. § 733), the statutory laws of the United States which are not locally inapplicable extend to Puerto Rico (48 U.S.C. § 734), the rights, privileges and immunities of U.S. citizens shall be respected in Puerto Rico "to the same extent as though Puerto Rico were a State of the Union" (48 U.S.C. § 737), and review of decisions of the Supreme Court of the Commonwealth of Puerto Rico by the U.S. Supreme Court is available upon the same basis a review from the decisions of the highest court of a state (28 U.S.C. §§ 1257, 1258). Congress has conferred upon Puerto Rico many of the attributes of quasi sovereignty possessed by the states. *People of Puerto Rico v. Shell Oil Company*, 302 U.S. 253, 261-262, 58 S.Ct. 167, 171, 82 L.Ed. 235, 242 (1937).

principles of federalism shall apply to relations with Puerto Rico.

Article IV, Section 1 of the Constitution provides:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved and the Effect thereof.

In crafting the unique relationship that exists between Puerto Rico and the United States of America, Congress itself has also legislated on the effect that is to be given to the Acts of Puerto Rico. 28 U.S.C. § 1738 provides, in relevant part:

> The Acts of the legislatures of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.
>
> . . .
>
> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

For purposes of this statute, Puerto Rico is to be treated as a state, territory or possession. *See, Americana of Puerto Rico, Inc. v. Kaplus*, 240 F. Supp. 854 (D.N.J. 1965), affirmed, 368 F.2d 431 (3rd Cir. 1966), cert. denied, 386 U.S. 943, 87 S.Ct. 977, 17 L.Ed.2d 874 (1967); *Torres v. Gardner*, 270 F. Supp. 1 (D.P.R. 1967). Other courts have relied upon the Full Faith and Credit clause of the Constitution to reach the same result. *See, Heritage Corp. of South Florida v. Rivas*, 289 So.2d 432 (Fla. App. 1974), cert. denied, 300 So.2d 901 (1974); *Hilton International Co. v. Arace*, 394 A.2d 739, 35 Conn. Supp. 522 (Conn. Super. App. 1977); *Gonzales Perez v. Romney Orchards, Inc.*, 399 S.E.2d 50,

184 W.Va. 20 (1990) (relying on the Full Faith and Credit Clause and 28 U.S.C. § 1738).

Regardless of whether the Full Faith and Credit Clause of the Constitution or whether Congressional enactment requires the courts of New Jersey to give effect to the laws of Puerto Rico to which Puerto Rico binds its citizens, it appears that the courts of New Jersey, and of New Jersey alone, are now on a course of refusing to give Full Faith and Credit to the Acts of Puerto Rico governing "family rights and obligaitons, or to the status, condition and legal capacity of persons" which have been determined by the Puerto Rican Legislature to "be binding upon the citizens of Puerto Rico, although they reside in a foreign country." Specifically, the laws of Puerto Rico relating to forced heirship and the conjugal partnership are now to be wholly disregarded by the New Jersey courts even in matters among citizens of Puerto Rico regardless of the clear enforceability and applicability of those laws in Puerto Rico. Indeed, in rejecting the existence of a claim arising from the conjugal partnership's ownership of assets, the Appellate Division simply pronounced that New Jersey does not "recognize" the legal entity (the conjugal partnership) that is created by Puerto Rican law (and Spanish civil law) with respect to spouses. Under the Constitution and Congressional enactment, the courts of New Jersey are not (and cannot be) permitted to set themselves up as a "super legislature" which can re-write the Acts of the Puerto Rican Legislature for the benefit of a disposition of assets being controlled by a deceased, former resident of New Jersey who, in an act prohibited by the laws of Puerto Rico (*See*, 31 LPRA §§ 3672, 3673) purported to create an *inter vivos* trust with respect to the disposition of property held by a conjugal partnership created and existing under the Laws of Puero Rico.

Regardless of the New Jersey courts' view with respect to the policies behind Puerto Rico's laws regarding the legal inability to disinherit one's heirs, the legal inability

of an heir to renounce or compromise his inheritance, and the ownership of all property which spouses acquire during marriage held by a separate legal entity (the conjugal partnership), those laws remain the principles which govern the legal rights and relations of the citizens of Puerto Rico.

Here, New Jersey has improperly and impermissibly intruded in the affairs of citizens and judicial entities of Puerto Rico, by, *inter alia*, disregarding the Puerto Rican laws of inheritance and by refusing to recognize and give full faith and credit to the settled laws of Puerto Rico which create and give legal recognition to the conjugal partnership. Conjugal partnerships are separate legal enties which hold title to all assets acquired by the spouses during their marriage, such title being to the exclusion of the individual spouses themselves. *See*, 31 L.P.R.A. § 3641. It can, and must, sue and be sued in its own name, and it is governed by the laws governing partnerships. *See*, *Mercado-Vega v. Martinez*, 666 F. Supp. 3, 4 n.3 (D.P.R. 1986); *Janer Vila v. Superior Court*, 90 P.R.R. 277, 295 (1964); *Carrasco v. Sec. of Health, Education and Welfare*, 628 F.2d 624, 630 (1st Cir. 1980). As a partnership, it has its own citizenship that is sepaarte and distinct from that of each of the spouses. *See*, *Fernandez-Cerra v. Commercial Ins. Co. of Newark*, 344 F. Supp. 314 (D.P.R. 1972). The conjugal partnership regime is distinct from, and significantly different from, a community property regime. *See*, *Fernandez-Cerra*, *supra*. The conjugal partnership thus becomes a fundamental feature of civil law marriages that are entered into in those jurisdictions.[9]

The courts below further failed to give full faith and credit to the laws governing the 1974 Amendment. Under Puerto Rican law, the contract's waiver of inheritance

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[9] Civil law jurisdictions include all of the countries of Central and South America, most of the Caribbean Islands and most of the countries of Europe.

rights and its penalty of twice the amount of attorneys' fees and costs for an unsuccessful contesting of any matter were illegal. *See*, 31 L.P.R.A. § 2370. The courts below did not give credit to that Puerto Rican law, even though the contract was one with a Puerto Rican citizen (Charles) who could not, as a matter of Puerto Rico law, waive his inheritance, was executed and performed in Puerto Rico, and included an express provision that if the contract could not be substantially enforced it would be cancelled and the parties returned to their prior positions. Assuming arguendo that the 1974 Amendment was "saved" from the invalidity arising from the purported inheritance waiver by way of the contract's reference to New York law, the courts below failed to give credit to New York's law rendering contractual penalties unenforceable. *See*, *e.g.*, *Jarro Building Industries Corp. v. Schwartz*, 281 N.Y.S.2d 420, 425 (N.Y. 2d Dep't 1967). Thus, in either event, the courts below failed to give the full faith and credit that was due to the governing law of a Commonwealth or a State, as the case may be.

The decisions below pose a threat to the principles of federalism that are set forth in the Constitution. It now signals a new course, where states are to be free to disregard federal legislation concerning such basic matters as the citizenship of those persons who reside in the lands that are under the authority of the United States. It now signals a new ability of states to disregard carefully devised laws governing the relationship between the United States and the Commonwealth of Puerto Rico. It now signals a new ability of states to refuse to give full faith and credit to Acts of other sovereigns to which they had heretofore been required to give full faith and credit.

The consequences of the decisions in this matter extend well beyond the many millions of dollars which are at stake. It extends beyond setting a precedent that will permit the impoverishment of legally protected persons by means of the misappropriation of the property of conjugal and other partnerships. The implications of this case, at

a very minimum, will affect millions of Hispanic persons in the United States and elsewhere who were married in jurisdictions where the conjugal partnership regime exists, and who may now be subjected by the decisions of state courts to marital property regimes that are foreign to their contractual agreements, experience and expectations. The decisions that have been made in this case impact even a much broader audience by affecting the very foundations of the relationship that Congress had created with the People of the Commonwealth of Puerto Rico and their rights as citizens of the United States. This case presents much more than just a dispute over notions of comity. Rather, with Congress having legislated with respect to both the issue of Puerto Rican citizenship and the effect to be given to the Acts of Puerto Rico, this case presents the more fundamental issue of the Supremacy of the Constitution and federal law. This Court should, therefore, grant certiorari.

II. THE DETERMINATION BY THE COURTS BELOW OF MATTERS WHICH WERE NOT PLACED IN ISSUE BEFORE IT, AND WHICH DETERMINATIONS WERE MADE WITHOUT FAIR NOTICE, CONSTITUTES A DENIAL OF DUE PROCESS

In this matter, the courts below entered and affirmed judgments with respect to matters which had not been pleaded, and without fair notice that judgment would be rendered on issues which had not been placed before it by the pleadings. In so doing, the courts below have come into conflict with a leading pronouncement by this Court of the principle of procedural due process. Such a conflict warrants the granting of certiorari under Supreme Court Rule 10(c).

Such occurred with respect to claims that Charles' bankruptcy estate had with respect to the estate of Charles' mother, Carolina. No pleading brought before the court the claims which Charles had against the estate of Carolina (both of whom were citizens and domiciliaries of

Puerto Rico at the time of her death, and which estate was not even a party before the court). Also, notwithstanding that the claims regarding the 1972 Agreement and the 1974 Amendment were pending before the Superior Court of Puerto Rico, that all but two of the parties to the contracts were not before the New Jersey court, that discovery in the New Jersey case had been limited to the issue of Prudencio's domicile, and that no competent proof was presented in support of a judgment against Charles' bankruptcy estate, the New Jersey court proceeded to enter a judgment of $6.9 million for attorneys' fees incurred on behalf of persons who were not even parties to the agreements.

Notwithstanding that Charles was expressly bequeathed one-fourth of Carolina's estate by will, the court, *on its own initiative*, undertook to enter a judgment declaring that Charles was not entitled to any inheritance from Carolina's estate without any jurisdiction over her estate, without any notice that it would even rule with respect to that estate, without any opportunity for discovery with respect thereto, and without due process.

"For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.' " *Fuentes v. Shevin*, 407 U.S. 67, 80, 92 S.Ct. 1983, 1994, 32 L.Ed.2d 556, 569 (1972) (quoting from *Baldwin v. Hale*, 68 U.S. (1 Wall.) 223, 233, 17 L.Ed. 531, 534 (1864)).

The protections of the constitutional requirement of due process are applicable to citizens of Puerto Rico through the application of either the Due Process Clause of the Fifth Amendment or the Due Process Clause of the Fourteenth Amendment. *Examining Board of Engineers, Arhcitects And Surveyors v. Flores De Otero*, 426 U.S. 572, 600, 96 S.Ct. 2264, 2280, 49 L.Ed. 65 (1975).

The trial court below, in deciding matters without notice that it would undertake to decide matters which had not been brought before it by the parties, clearly denied procedural due process to Charles' bankruptcy estate. That estate, being entitled to the assets of Charles, was thus deprived of the due process it needed to establish and preserve its rights. It was also denied due process in that the New Jersey court would not permit discovery with respect the penalty provisions of the 1974 Amendment and proceeded to enter a judgment of millions of dollars even though no competent evidentiary proof was presented to the court. The court's haste to conclude disputes that were not even before it was no substitute for the notice to which Charles' bankruptcy estate was entitled under the due process clauses of the Constitution.

This denial of due process is particularly appropriate for the granting of certiorari. The court below impermissibly intruded in affairs which Congress has committed to the government of the Commonwealth of Puerto Rico. In this matter, the courts of the State of New Jersey have taken it upon themselves to purportedly adjudicate matters (i) between citizens of Puerto Rico (Charles' rights with respect to the estate of Carolina involves only citizens of Puerto Rico), (ii) involving persons who were not before the court, (iii) without the claims themselves having been before the court, and (iv) without notice to the Puerto Rican citizens involved.

These events are not mere minor procedural miscues by the courts below; but in fact are major denials of the most fundamental concepts of due process which affect significant substantive rights of citizens of the United States and of the Commonwealth of Puerto Rico. It would exceed anyone's sense of fairness and due process for a foreign jurisdiction to determine, without notice, the rights of U.S. citizens who are not before it and who thus have not submitted their claim to that court. It should no less exceed this Court's tolerance for a court of one of the states to do the same to citizens of another jurisdiction;

especially to citizens of a jurisdiction with respect to which Congress has carefully fashioned an intricate series of rights and relationships.

The denial of procedural due process in this matter, which clearly impacts relationships involving citizens of a jurisdiction with which Congress has carefully established a particular relationship, can and should be redressed by the grant of certiorari in this case.

CONCLUSION

For the reasons stated above, Petitioner respectfully requests that this Court issue a writ of certiorari to review the decisions of the New Jersey courts below.

Respectfully submitted,

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February 1, 1999

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APPENDIX

[Filed Nov. 5, 1998]

SUPREME COURT OF NEW JERSEY
C-329 September Term 1998

46,543

IN THE MATTER OF THE SETTLEMENT OF THE ACCOUNTS OF JOSEPH UNANUE and FRANK UNANUE, TRUSTEES UNDER THE TRUST AGREEMENT DATED NOVEMBER 16, 1970, AS AMENDED BY and AMONG PRUDENCIO UNANUE, AS GRANTOR, and PRUDENCIO UNANUE, JOSEPH UNANUE and ANTHONY UNANUE AS TRUSTEES OF SIXTEEN TRUSTS THEREUNDER

(CHARLES UNANUE-PETITIONER)

ON PETITION FOR CERTIFICATION

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-3915-94 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 2nd day of November, 1998.

/s/ [Illegible]
Clerk of the Supreme Court

[Filed Nov. 5, 1998]

SUPREME COURT OF NEW JERSEY
C-330 September Term 1998

46,543

IN THE MATTER OF THE SETTLEMENT OF THE ACCOUNTS OF JOSEPH UNANUE and FRANK UNANUE, TRUSTEES UNDER THE TRUST AGREEMENT DATED NOVEMBER 16, 1970, AS AMENDED BY and AMONG PRUDENCIO UNANUE, AS GRANTOR, and PRUDENCIO UNANUE, JOSEPH UNANUE and ANTHONY UNANUE AS TRUSTEES OF SIXTEEN TRUSTS THEREUNDER

(CHARLES UNANUE-PETITIONER)

ON PETITION FOR CERTIFICATION

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-3915-94 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 2nd day of November, 1998.

/s/ [Illegible]
Clerk of the Supreme Court

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

A-3915-94T3
A-4130-94T3

IN THE MATTER OF THE SETTLEMENT OF THE ACCOUNTS OF JOSEPH UNANUE AND FRANK UNANUE, Trustees under the Trust Agreement dated November 16, 1970, as Amended, by and among PRUDENCIO UNANUE, as Grantor, and PRUDENCIO UNANUE, JOSEPH UNANUE and ANTHONY UNANUE, as Trustees of Sixteen Trusts Thereunder.

Argued May 5, 1998—Decided May 19, 1998

Before Judges Pressler, Wallace and Carchman.

On appeal from the Superior Court of New Jersey, Chancery Division, Bergen County, whose opinion is reported in part at 255 *N.J. Super.* 362 (Law Division 1991).

PER CURIAM

By these appeals, which we consolidate for purposes of this opinion, defendant Charles Unanue challenges orders of the Chancery Division, Probate Part, approving the final accounting of the trustees of a trust established by

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1 Although this action was initiated in the Law Division, Probate Part in 1987, thereafter the Probate Part was assigned to the Chancery Division. *See R.* 4:3-1(a)(2) effective September 4, 1990. In keeping with the original filing of the complaint, the Probate Part's published opinion was captioned in the Law Division, Probate Part, but thereafter the matter was recaptioned in the Chancery Division, Probate Part.

Prudencio Unanue on November 16, 1970; rejecting defendant's claim to any interest in the assets of the trust or the assets of the estate of Prudencio Unanue, who died in 1976; validating an agreement made in 1972 between defendant and Goya Foods, Inc. and its affiliates and a 1974 amendment of that agreement by which defendant waived his interest in those assets; determining that defendant's breach of the 1974 agreement entitled plaintiffs to compensatory damages including attorney fees; and assessing damages against defendant in the amount of $6,890,820.07 together with a portion of the fee of the special master appointed to address the damages issue.

We affirm all the orders appealed from substantially for the reasons stated by Judge Kole and Judge Lesemann for reaching their respective determinations. We add only the following observations.

Because of the detailed factual recitations and findings contained in Judge Kole's exhaustive reported opinion, we need make only brief reference to the salient facts. The decedent and trust settlor, Prudencio Unanue, born in Spain, moved to Puerto Rico in 1904 to engage in various business ventures. He married his wife Carolina in Puerto Rico in 1921. Following his marriage, he came to the United States, where he had earlier studied, to earn his livelihood. Carolina and their first-born son, defendant Charles, joined him in Brooklyn, New York, shortly thereafter. Two more sons were born to the Unanues while they lived in Brooklyn, Joseph and Anthony. In 1929 the family moved to Ridgefield Park in New Jersey where the fourth son, Frank, was born. Five years later, the family moved to Bogota, New Jersey, and some years thereafter bought the house Prudencio had originally rented. The family lived in that house until 1962 when Prudencio and Carolina bought a new house in Tenafly, New Jersey. By that time all the sons, who had grown up and attended school in Bergen County and had completed their military service, had married and established their own homes. Prudencio was naturalized as an American citizen in 1946

and Carolina in 1956. It was not until 1949 or 1950 that either Prudencio or Carolina left New Jersey to visit Puerto Rico, and in the late 1950's, they had established the practice of spending the winter months in Puerto Rico.

By 1936, Prudencio, who had engaged in various business ventures in New York, established a sole proprietorship which ultimately became Goya Foods, Inc., and its various affiliates. The company was headquartered in New York City until 1974, when the business was moved to Secaucus, New Jersey. All the sons were engaged in the Goya operations, and by 1969, when he was dismissed from his positions following family business disputes, defendant was the chief operating and chief executive officer of all the companies.

In 1970 Prudencio completed his final estate plan by executing both an *inter vivos* trust and a will. He conveyed to the trust, whose beneficiaries were all his grandchildren, including the children of defendant, his principal asset, namely, his shares in Goya. His residuary estate "poured over" into the trust. In the meantime, the family disputes between defendant and his brothers and father, which had already been the subject of protracted litigation, were finally settled by the execution of a settlement agreement in 1972 and an amended agreement in 1974 between defendant and the Goya companies for the stated benefit not only of the businesses but also for the benefit of defendant's parents and brothers and their respective heirs and assigns. By these agreements, Charles, for a substantial consideration, sold his interest in the Goya companies back to the companies, agreed to the dismissal of all litigation, waived all his rights to the companies and his father's estate, and, by the 1974 amendment, covenanted

> . . . for the benefit of the Companies, the Additional Companies, Charles' Brothers, Prudencio Unanue and their estates, heirs, beneficiaries, successors, legal representatives and assigns, that he irrevocably dis-

> claims and renounces any and all interests he may have or may hereafter have in the assets or estate of Prudencio Unanue, whether under any will, trust, by intestacy, by virtue of relationship, by other operation of law, or otherwise, and that Charles will not at any time or in any way contest, challenge, interfere with, hinder, or seek to invalidate, set aside or impair, in whole or in part, in any court, tribunal, agency or any other governmental organ or forum (of any jurisdiction) or otherwise, any will, gift, trust, other testamentary or inter vivos disposition by operation of law or any other disposition of property of any kind of or by Prudencio Unanue, or institute, bering, prosecute or make any claim, suit, proceeding (including, without limitation, any proceeding to construe any testamentary or inter vivos instrument), cause of action or objection (including, without limitation, objection to the jurisdiction of any court) relating to any such will, gift, trust or other disposition or devolution. Charles understands and acknowledges that he is not a beneficiary or recipient of any property or interest under any present instrument relating to the disposition of the assets or estate of Prudencio Unanue and agrees to execute all documents and take any and all actions in any jurisdiction necessary or required effectively to waive or renounce any rights or claim he may have or may hereafter have with respect to any of the matters referred to in this Section 6.03 under any of the foregoing.

The 1974 agreement further provided that in the event of a suit or proceeding by a party to the agreement or by Prudencio, the losing party was obligated to pay as liquidated damages twice the costs and expenses of the litigation, including reasonable attorneys' fees.

Prudencio died in Puerto Rico in 1976. His will was probated in Bergen County. The trust continued, as there-

tofore, to be administered in Bergen County. Interim accountings were rendered in Bergen County. All went smoothly until 1987, when defendant claimed entitlement to an inheritance from his father and an interest in the Goya shares that had been placed in trust. This litigation ensued by the trustees who sought a declaration that defendant had no interest either in the trust or the estate.

The linchpin of defendant's claim is that Prudencio was a domiciliary of Puerto Rico both in 1970, when he executed the trust document, and in 1976, when he died. Defendant asserts that under Puerto Rican law, which therefore governed Prudencio's estate, he could not have been disinherited and hence that his waivers contained in the 1972 and 1974 agreements were void. He also argues that Puerto Rican law of conjugal partnership applied to the disposition of Prudencio's shares of Goya and hence that at least half of those shares remained vested in Carolina, through whose estate he, defendant, would take.

The domiciliary issue was tried over the course of 170 trial days by Judge Kole, whose detailed findings and conclusions are set forth in his opinion reported as *Matter of Unanue*, 255 *N.J. Super.* 362 (Law Div. 1991). The voluminous record amply supports his findings on which he based his conclusion that Prudencio's domicile prior to 1970, in 1970, and in 1976 remained in New Jersey. There is no basis at all in this record for us to interfere with either his findings or conclusions. *See, e.g., Rova Farms Resort v. Investors Ins. Co.*, 65 *N.J.* 474, 483-484 (1974). We therefore affirm Judge Kole's decision.

The inevitable consequence of the domiciliary decision, as Judge Lesemann concluded in granting plaintiffs' summary judgment motion, is that New Jersey law applies to all questions arising out of the administration of Prudencio's trust and estate. It is well-settled that New Jersey law does not prohibit the disinheriting of an adult child. *See, e.g., In re Estate of Campbell*, 71 *N.J. Super.* 307,

310 (Cty. Ct. 1961).[2] There is, therefore, no legal basis upon which defendant can sucessfully argue that he is entiled to a share of Prudencio's estate or that the 1972 and 1974 agreements are invalid because his waiver of his inheritance rights was contrary to Puerto Rican law.

Defendant, however, also challenges the trust on the ground that under Puerto Rican law of conjugal partnership, Carolina had an interest in the shares of Goya that Prudencio owned and hence that Prudencio could not unilaterally dispose of them by transferring them to the trust. We agree with Judge Lesemann's disposition of this issue as well. Judge Kole's findings mandate the conclusion that at the time of Prudencio's acquisition of his shares of Goya Foods, Inc., as well as his ownership of its predecessor entities, he was domiciled in New Jersey, which recognizes neither community property nor conjugal partnerships. Defendant nevertheless argues that the law of the place of the marriage continues to control rights to spousal property ever afterwards and hence that any personal property acquired by Prudencio at any time and irrespective of domicile of the acquiring spouse was subject to Puerto Rican law of conjugal partnership. We disagree. As a matter of well-setted conflicts-of-law principles, it is clear that the law of the place of the domicile of the acquiring spouse at the time of the acquisition governs the determination of whether the acquired property is separate or community. *See, e.g., United States v. ITT Consumer Financial Corp.*, 816 *F.*2d 487, 490-491 *n.*7 (9th Cir. 1987).

Defendant also challenges the enforceability in this action of section 8.01 of the 1974 agreement which provided for payment by the losing party of double the litigation expenses in the event of "any suit, action or pro-

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[2] We note that *N.J.S.A.* 3B:5-16 made no substantive change in former *N.J.S.A.* 3A:3-10 and -11, on which the *Campbell* court relied and which was the statute in effect at the time of Prudencio's death.

ceeding instituted by any signatory to this Agreement or the Collatera Covenants at the foot hereof or by Prudencio Unanue involving any other such signatory or Prudencio Unanue concerning any matter. . . ." Judge Lesemann considered each ground of objection raised by defendant, and we concur with his disposition for the reasons stated by him in his oral opinion of March 28, 1994. In sum, Judge Lesemann concluded first that the contractual provision for payment of attorneys' fees was valid both under the law of New Jersey, the forum, and under the law of New York, which was specified for choice-of-law purposes in the agreement. That decision is unexceptional. *See, e.g., Instructional Systems v. CCC.*, 130 *N.J.* 324, 341 (1992) ("[o]rdinarily when parties to a contract have agreed to be governed by the laws of a particular state, New Jersey courts will uphod the contractual choice if it does not violate New Jersey's public policy"); *Satellite Gateway Com. v. Musi Dining Car Co.*, 110 *N.J.* 280, 285-286 (1988) (holding that despite the constraints of the so-called American rule, an allowance of counsel fees may be made even if not authorized by rule or statute where the parties themselves have so agreed in advance by contract).

Next, while Judge Lesemann agreed with defendant that the double payment constituted an unenforceable penalty, he was satisfied that that proviso was severable from the provision that damages would include reasonable attorneys fees. We agree both with his penalty decision and with his severability decision. It is plain that the protection against the incurring of litigation expenses by the successful litigant was at the heart of section 8.01, and it is also plain that the provision of that protection by agreement is perfectly lawful and enforceable. We also agree, for the reasons stated by Judge Lesemann, that the benefit of the attorney fees provision was intended to include all third-party beneficiaries of the agreement in addition to its signatories and Prudencio himself. And those third-party

beneficiaries were, as repeatedly stipulated throughout the agreement, the signatories' and Prudencio's heirs and assigns.

Finally, defendant challenges Judge Lesemann's reference to a special master for the determination of the amount of counsel fees incurred by plaintiff. We are satisfied that the reference was in full accord with *R.* 4:41-1. It was approved by the Assignment Judge, initially consented to by all parties although defendant later attempted to withdraw his consent, and the circumstances were extraordinary in that the years of litigation instigated by defendant in a plethora of courts and jurisdictions resulted in massive documentation and explanation of the substantial fees incurred by plaintiffs. The sheer volume of the material rendered the issue particularly suitable to review and recommendation by a master. In any event, the master's report was duly submitted, and we affirm its acceptance by Judge Lesemann for the reasons stated by him on February 23, 1995.

All of the issues to which we have referred herein were raised by defendant in his appeal under Docket Number A-3915-94T3. We find without merit the remainder of his challenges raised in that appeal. *R.* 2:11-3(e)(1)(A) and (E).

We address now the single issue raised by defendant, through other counsel, in his appeal under Docket Number A-4130-94T3, namely, that the trial court erred in entering judgment against defendant individually and thereby deprived him of his right to procedural due process. At the outset, we doubt the procedural viability of this separate appeal. There is no reason why the issue could not and should not have been raised in the main appeal which was filed by defendant individually on his own behalf alone. A party is required to raise in a single appeal all of his challenges to the judgment appealed from. The appellate court has no greater tolerance for piecemeal litigation than do the trial courts, and the filing of separate

appeals by the same party from the same final judgment is an obvious, untenable, and intolerable violation of the overriding policy of judicial administration that litigation be conducted expeditiously, economically, and efficiently. We have nevertheless considered the substance of the issue raised by this separate appeal, and we are persuaded that it is entirely without merit. Defendant's argument is based on the fact that during the course of the litigation, he was substituted for by the trustee in bankruptcy in his then pending bankruptcy action, of which he apparently had filed several. There was no formal order re-substituting defendant when that action was dismissed and the assets of the estate in bankruptcy revested in him. Nevertheless, defendant, as a *pro se* litigant, actively engaged in the defense of the action, seeking relief by way of cross-motions, and otherwise conducting himself as a full-fledged and knowledgeable litigant. He thereby submitted himself for all purposes to the jurisdiction of the court, sought its relief, and fully participated in all proceedings. His present claim that he was denied procedural due process by the trial court rests not on any substance but on the technical oversight of the failure of entry of an order resubstituting defendant for the trustee in bankruptcy. The fact remains that the conduct of the litigation proceeded from the mutual assumption of all parties and the court that that resubstitution was, in actuality, the case, as indeed it was. We think it plain that under these circumstances, defendant must be deemed to have waived the necessity of the formal order and that he must be estopped from seeking to obtain any litigation advantage from its omission.

The final judgment and all interlocutory orders appealed from in both appeals are affirmed.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Docket No. A-004120-94T3
Motion No. M-006572-97

I/M/O THE SETTLEMENT OF THE ACCOUNTS OF
JOSEPH UNANUE ETC.

Motion Filed: June 09, 1998

Submitted to Court: July 06, 1998

ORDER ON MOTION

This matter having been duly presented to the court, it is on this 14th day of July, 1998, hereby ordered as follows:

Motion by appellant for reconsideration to file nunc pro tunc

Supplemental:

The motion to file nunc pro tunc is granted.

The motion for reconsideration is denied.

FOR THE COURT:

/s/ Sylvia B. Pressler
SYLVIA B. PRESSLER
P.J.A.D.

[Filed Jul. 16, 1998]

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Docket No. A-003915-94T3
Motion No. M-006182-97

I/M/O THE SETTLEMENT OF THE ACCOUNTS OF
JOSEPH UNANUE ETC.

Motion Filed May 29, 1998

Submitted to Court: July 6, 1998

ORDER ON MOTION

This matter having been duly presented to the court, it is on this 14th day of July, 1998, hereby ordered as follows:

Motion by appellant for reconsideration

Denied

For the Court:

/s/ Sylvia B. Pressler
SYLVIA B. PRESSLER
P.J.A.D.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: BERGEN COUNTY
PROBATE PART

Docket No. M-128817

Civil Action

IN THE MATTER OF THE SETTLEMENT OF THE ACCOUNTS OF JOSEPH UNANUE and FRANK UNANUE, Trustees Under the Trust Agreement Dated November 16, 1970, as Amended, By and Among PRUDENCIO UNANUE, as Grantor, and PRUDENCIO UNANUE, JOSEPH UNANUE and ANTHONY UNANUE, as Trustees of Sixteen Trusts Thereunder

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Decided: December 4, 1991

OPINION

Kole, Martin J., J.A.D., retired and temporarily assigned on recall

There are two issues in this case:

(1) What was the domicile of Prudencio Unanue (Prudencio) on November 16, 1970, the date he executed an *inter vivos* Trust Agreement; and

(2) What was Prudencio's domicile on March 17, 1976, the date of his death.

Plaintiffs, who are the beneficiaries of the November 16, 1970 Trust Agreement (all of Prudencio's present living grandchildren), the trustees under the Trust Agreement

and the executors of Prudencio's probated will, contend that on each of these dates, that domicile was in Tenafly, New Jersey. Defendant Charles Unanue (hereinafter referred to as "Charles") one of Prudencio's sons, contends that on each of these dates, Prudencio's domicile was in Puerto Rico.

It is undisputed that:

1. Prudencio executed a Trust Agreement (the Trust) on November 16, 1970 in Brooklyn, New York. The Trust was revocable by Prudencio during his lifetime.

2. On the same date, November 16, 1970, Prudencio executed a last Will and Testament (the Will) in Brooklyn, New York. The Will was probated in Bergen County, New Jersey on August 11, 1976.

3. The executors appointed under the Will are three of Prudencio's four sons: Joseph Unanue (Joseph), Frank Unanue (Frank), and Anthony Unanue (Anthony).

4. The trustees appointed under the Trust are Prūdencio, Joseph, Anthony, and later, Frank. Frank became a trustee on May 21, 1971.

5. The trust assets are 53 shares of Class A stock of Goya Foods, Inc. theretofore owned by Prudencio. These shares then constituted a majority of the issued and outstanding voting shares of Goya.

6. The ultimate beneficiaries of the Trust are Prudencio's grandchildren, including the children of Charles. The ultimate beneficiaries of the residuary estate under the Will are also such grandchildren, sinc the Will provides that the residuary estate be paid to the trustees under the Trust and added to the Trust estate to be held, administered and distributed in accordance with the provisions of the Trust.

7. Neither the Trust nor the Will contains any provision for the benefit of any of Prudencio's children: Charles, Joseph, Anthony, or Frank.

8. The Trust refers to Prudencio as a "resident of the State of New Jersey." It also provides that, except as otherwise provided therein, it "shall be construed under, and the trusts and shares hereunder shall be governed in all respects by, the law of the State of New Jersey."

9. The Will states that Prudencio is a "resident of Tenafly, County of Bergen, State of New Jersey."

10. Anthony died in Columbia Presbyterian Hospital, New York City, on March 23, 1976, 6 days after March 17, 1976, the date of Prudencio's death. Hence, the present remaining trustees under the Trust and the executors under the Will are Joseph and Frank.

11. Carolina Unanue (Carolina) was Prudencio's wife and the mother of Charles Joseph, Anthony and Frank. She died in 1984. Her maiden name was Carolina Casal Valdes.

One significant issue that remains to be tried and decided hereafter may be predicated upon the determination by this Court of the domicile question—that is, Charles' rights, if any, to a share of the assets of the Trust or devised by the Will.

Charles contends that, by reason of the Puerto Rican domicile of Prudencio on either or both dates—November 16, 1970 and March 17, 1976—,under the applicable law of Puerto Rico, Carolina was entitled to a community property interest in the assets of the Trust and of the estate; Charles was entitled to his share of the Trust and estate assets as a forced heir of Prudencio and beneficiary under Carolina's will of her community property interest; and neither the Trust nor the Will could legally divest him of these property rights.[1] The Trust beneficiaries claim

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[1] Charles also argues that, irrespective of Prudencio's domicile, he cannot be deprived of his share of inheritance (including the Goya shares of stock) from Carolina. He claims that the community property laws of Puerto Rico apply to Carolina since she and Prudencio were married there.

that the Trust dispositions are not at all affected by Puerto Rico law. They assert that when the Trust was created on November 16, 1970, Prudencio was domiciled in New Jersey, that New Jersey law applies and that Charles has no property right in the Trust assets under that law. They further claim that, even if Puerto Rico was Prudencio's domicile on the date of his death in 1976, the 1970 Trust's disposition of assets cannot be attacked under Puerto Rican law. Additionally, they contend, as do the executors, that, in any event, Prudencio's domicile on both dates was in New Jersey. The executors take the further position that, even if Prudencio's domicile was in Puerto Rico when the Trust was executed in November 1970, he was domiciled in New Jersey on his death in March, 1976, and that under the law of this State, Charles is entitled to no property rights in the estate or in the assets of the revocable Trust. *See Harrall v. Wallis,* 37 *N.J. Eq.* 458 (Ch. 1883), and affirming opinion. *Harral v. Harral,* 39 *N.J. Eq.* 279 (E.&A. 1884); *Trustees of Princeton University v. Trust Co. of N.J.,* 22 *N.J.* 587 (1956).

FACTUAL CREDIBILITY

A substantial part of this case hinges on the Court's appraisal of the credibility of witnesses and of documentary proofs. It is largely under the umbrella of credibility that a considerable amount of trial time was taken in allowing evidence respecting the reasons for Charles' being evicted from the business in June of 1969, as well as the events leading up to the actual execution of the 1972 and the 1974 settlement agreements between Charles, on the one hand, and the various companies, his brothers and his father, on the other. It was for this reason likewise that a significant amount of prior and existing litigation involving these parties was the subject of somewhat extensive inquiry at the trial.

These credibility factors, although relating to what appears to be a collateral matter, are of material conse-

quence in determining what might otherwise be ambiguous or unclear indicia relating to the issue of domicile.

The character of the various witnesses who testified, which the Court was able to determine by observing witness demeanor and hearing testimony, is, of course, important in determining the credibility to be given to the evidence presented. This is particularly so here, where the testmony relates to events occurring before March 17, 1976 and covering not only a period of many years before November, 1970, when Prudencio last left for Puerto Rico, but from November 1970 through March 17, 1976. Contradictions in testimony and failures to recollect, in many instances, may well be traceable to such matters as fading memories and lost evidence. *See Union City Housing Authority v. Commonwealth Trust Co.*, 25 *N.J.* 330, 335 (1957).

Charles' testimony is often conflicting and confusing even as to the same subject matter. Much of this, it is true, can be attributed to the time lag between the events described and the date the evidence was given at trial and hence, to a not unusual fuzziness of recollection; but much of it appears to be a desire to rehabilitate prior evidence in order to bring it in line with Charles' various theories supporting Prudencio's domicile in Puerto Rico rather than New Jersey.

Thus, often after testifying to one set of facts, when faced with contrary testimony in a prior trial or deposition, Charles' response was that either he was mistaken in the earlier testimony or did not fully understand the import of the question, or what he had said was just wrong and what he is now saying is correct. Even when faced with legal documents prepared by his then attorneys and in which there is no doubt in my mind that he participated personally, he disavows knowledge of contents of documents which he signed where the provisions thereof would appear to be harmful to his present testimony. He has a

tendency not to take personal responsibility for solemn acts which occurred, such as the contents of pleadings, affidavits and the like prepared by his attorneys, often blaming his attorneys for doing something totally unauthorized by him or charging acceptance of bribes or wrongful cooperation with his adversaries on behalf of his then attorneys. These criticisms of attorneys' conduct are many and are directed at a great number of attorneys whom he hired and fired during the course of the various and many lawsuits in which he has been engaged at least since 1969. Certain testimony, given during the course of other litigation, which conflicts with that at trial, is justified by him or his attorney as being given in a context in which domicile of Prudencio was not in issue, as if the issues in specific cases constitute adequate warrant for testifying differently in each case as to a significant *fact*. *Cf. Simon Levin v. Robinson, Wayne & LaSala, Esqs.*, 246 *N.J. Super.* 167 (Law Div., 1990); *Stretch v. Watson*, 6 *N.J. Super.* 456, 469 (Chan. Div. 1949), *aff'd in part, rev'd in part on other grounds*, 5 *N.J.* 268 (1950); *Koppel v. Olaf Realty Corp.*, 56 *N.J. Super.* 109, 121 (Ch. Div. 1959), *aff'd.* 62 *N.J. Super.* 103 (App. Div. 1960).

It is evident that with respect to much of the testimony or information he gave at trial and in other litigation, what he said in each instance was intended to effect the intended result in this and the other litigation at the time.

Charles' truthfulness and credibility have been significantly impaired by his own testimony.

To a much lesser extent, such impairment of credibility also applies to the testimony given by Frank and Joseph. Of course, there too, the length of time between the event testified to and the trial plainly affected their ability to recall. But parts of their testimony are obviously designed to effect direct support for the proposition that Prudencio intended, throughout his stay in Puerto Rico from the second half of November 1970 onward, to return to New Jersey.

Even much of the documentary evidence here, including Prudencio's death certificates, is subject to credibility assessments. For example, there are some documents which Charles signed about which he denies knowledge; and there are documents prepared by Charles' various attorneys, portions of which he denies ever authorizing or knowing about (including his attorney's memorializations of an interview among Charles, his attorney and IRS agents, as well as pleadings filed in this case). I find these disclaimers of knowledge or authorization to be incredible. There are also documents in which the terms used, particularly those in Spanish, are subject to varying interpretations. In the latter type of document, for example, the questioned Spanish word is "vecino" or "vecindad" which may or may not mean simply residence or, on the other hand, domicile or permanent residence. The meaning depends upon, among other things, the care which a particularly notary exercised in informing the person involved what the term meant and seeking out the facts to determine, before using the term, whether the person was truly a permanent resident of the place cited or only a resident, temporary or otherwise. These documents, to the extent they are claimed to support a permanent residence or domicile of Prudencio in Puerto Rico, are of no persuasive effect without further evidence or explanation. At best, they are equivocal as to the meaning of these terms in each of the documents presented at trial.

In January, 1970, Charles instituted an action in the Delaware State Court against Caribbean Canneries, Inc. and his brothers, including Frank who then resided in Puerto Rico. The defendants removed the case to the Federal Court in Delaware but it was remanded by that Court to the State Court. In a written opinion, *Unanue v. Carribean Canneries, Inc.*, 323 *F. Supp.* 63 (*D.C.* Delaware) decided February 24, 1971, the Court held that since Charles was then a citizen or domiciliary of Puerto Rico and Frank and Caribbean were also citizens or domi-

ciliaries of Puerto Rico, the action was not removable on diversity grounds.

In that action, Charles testified, and the Court found, among other things that, in November, 1966, upon advice of the company's counsel, he purchased the Kings Court condominium apartment and that "Charles' Kings Court home was used by his parents during some of the winter months". The Court further stated that in "November, 1968 Charles, wanting a home which he could occupy at any time of the year, sold the Kings Court apartment to one of the family companies and purchased a new condominium apartment at 860 Ashford Ave., Santurce, Puerto Rico which he still owns."

In the present case, Charles testified that he purchased the apartment for the use of his parents, rather than his own use and that he used it only when they did not. He stressed that his parents spent more time in the winter months at the Kings Court apartment—as much as 6 or 7 months per year.

Throughout this trial, Charles has denied his knowledge that Prudencio had arthritis until fairly recently. In addition, he has emphasized that Prudencio's true home and domicile has always been Puerto Rico and that he came to the New Jersey area only in the summer months because it was too hot in Puerto Rico. However, in late July 1969, Charles sent a memorandum to his then attorney, Timen & Greene, in which he stated that Prudencio supervised operations in New York at Goya but because of arthritis, he spent the three winter months in Puerto Rico actively supervising the Puerto Rican companies' operations. He further stated that in the last three years,—apparently 1967, 1968, and 1969—, Prudencio's "stays" in Puerto Rico were of approximately 7 months' duration. The word "stay" obviously connotes a temporary abode rather than a permanent home.

At trial, Charles made very technical arguments in endeavoring to distinguish what appear to be prior inconsistent statements under oath (such as answers to interrogatories) in other litigation. In the prior case it was in his interest to say or show he was domiciled and residing in the Kings Court condominium in Puerto Rico. In his interrogatory answer, he stated that monthly charges on account of the condominium were paid by one of the companies and charged to his loan account, which, from time to time, would be repaid by him so that in effect he paid the monthly charges. Here, the thrust of his contention is that the condominium was purchased and paid for by the Puerto Rican companies for the use of his parents. Thus, before me he stated that he did not pay the carrying charges on the condominium or personally repay to any Puerto Rican company amounts showing such payment by one of the companies.

At trial he said that he did not see the Kings Court condominium before it was purchased. Earlier in the trial he stated the following: "I asked by brothers [Joseph and Frank] to look at it and give me their opinion. They liked it *too*." (Emphasis added). He attempts to reconcile these statements by stating that he did not actually see the apartment but relied upon his brothers' description of it to him. During trial it was his contention that the apartment was purchased not for his own use but for his parents. His reluctance to admit that he had seen it before its purchase is patently tied in with his endeavor to show that the condominium was bought not for him but for his parents.

Charles' testimony as to his alleged conversation with his brother Anthony before Anthony left to reside with his family in Spain is revealing as to his endeavor to tailor what he says by shifting factual accounts to meet contrary matter confronting him at trial.

In 1973 Anthony went to Spain, according to reliable witnesses, because he was upset about the fact that the

government was allowing abortions and he was paying taxes for that purpose. Charles was discharged by the companies in mid-1969. Accordingly, he had very little, if any, contact with Anthony thereafter until some time in 1974. Nevertheless, he testified that before mid-1969 while Charles was still with the companies, Anthony told him personally that he objected to paying federal taxes because they would be used to pay for abortions. When faced with evidence that *Roe v. Wade* was not decided by the U.S. Supreme Court until 1973 and the lower District Court case to the same effect was not decided until June 1970, his position shifted to a discussion of the liberality of abortion practices in Puerto Rico, which also outraged Anthony. I am satisfied that the testimony as to Anthony's moving to Spain was predicated on what he heard from others during trial, and represented Charles' own speculations, without any first-hand factual support. His purpose may have been to tarnish his brothers and Anthony's heirs by charging them with wrongfully probating Anthony's estate in New Jersey instead of Spain, of which, Charles contends, he was a citizen and domiciliary at his death.[2]

At one point during the trial, Charles asserted that he had found out about his brother Anthony's leukemia in 1966 or earlier. Dr. Whitlock testified that he had examined Anthony and diagnosed leukemia for the first time in March 1967. Thereafter, Charles testified that there had been an earlier such diagnosis by a local doctor whose name and address he did not recall and that the x-rays taken by that physician had been sent to Columbia Presbyterian Hospital where Whitlock practices. But no proof has been submitted indicating that these x-rays were ever submitted to Whitlock or any one else at the hospital.

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[2] In passing, Charles referred to the Tenafly home where Anthony stayed in 1976, when he was ill with leukemia, as "my father's domicile." This appears to have been a slip of the tongue and cannot be held against Charles.

Charles had maintained during part of the trial that Prudencio went to Spain in 1970 to wind up his affairs and retire to Puerto Rico because he knew he had prostate cancer. Later in the trial he shifted his position and, instead, claimed that Prudencio went to Spain in 1969 or 1970 in preparation for permanent retirement in Puerto Rico, but his knowledge of cancer was not a motivating factor.

It was stipulated by Charles at trial, after much backing and filling and self-contradictory testimony by him, that there is no evidence of a conspiracy to create a fictional New Jersey domicile as to Falero before January 1, 1966.[3] He testified that the conspiracy meeting occurred in June, 1966. This alleged conspiracy is discussed hereafter. I note, however, that on the earlier November 1, 1965 deed of the Bogota house from Prudencio and Carolina to Joseph and his wife, the residence of Prudencio and Carolina is stated as Tenafly, New Jersey. This is indicative of a genuine residence and domicile in Tenafly at that time, more than three years after the Tenafly house was purchased, and some 7 months before the claimed conspiracy meeting.[4] It was more than simply a self-declaration of domicile.

Among additional indicia of Charles' lack of credibility are his positions with respect to his residence and domicile. In Puerto Rican litigation in 1987 Charles posted a non-resident bond. When Charles was asked about this bond, he testified that he was a resident and domiciliary of Puerto Rico since 1962 but filed the non-resident bond because

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[3] Augusto Falero, a resident of Puerto Rico, is claimed by Charles to be Prudencio's illegitimate son.

[4] Title to the Tenafly house, purchased in June 1962 for the use of Prudencio and Carolina and occupied by them since July 16, 1962, was transferred by Goya to Carolina on May 12, 1966, one month before the alleged conspiracy meeting. The house was acquired about 4 years before this claimed meeting.

it was less expensive than having the court determine whether Charles was a resident of Puerto Rico.

Charles' claim in the present case that he has been a resident and domiciliary of Puerto Rico since 1962 contradicts assertions Charles made in prior litigation.

In Charles' 1984 affidavit in a New York matrimonial action, involving his wife Lois, Charles stated that he was *living* in Spain since 1972 and was not a resident of New York since 1970. While it is possible that in 1984 Charles had lived in Spain since 1972 and yet considered himself a resident and domiciliary of Puerto Rico, such an intrepretation of the facts becomes tenuous when one considers that nothing is said in the affidavit about a Puerto Rican residence or domicile.

Additionally, in a 1986 power of attorney and subsequent pleadings filed in the estate of Jesusa matter in Spain, involving his aunt's estate, Charles claimed he was a resident of New York.[5] There, too, no mention is made of a Puerto Rican residence or domicile.

Even if it is assumed that the differing claims of residence made in the 1984 affidavit in the New York matrimonial action and the papers from the Spanish litigation are not contradictory as to each other, based upon Charles' stated understanding of the words "residence" and "domicile", it is extremely difficult to escape the conclusion that the assertions of residence made in the Spanish litigation and the New York matrimonial action are inconsistent with those made before this court—that he was a resident and domiciliary of Puerto Rico since 1962.

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[5] Charles instituted an action in Spain to contest the will of Prudencio's sister, Jesusa. It appears that she left everything to a cousin instead of to Charles and his brothers. Charles contested the will on the ground that she was incompetent. The will was upheld.

Charles' challenge here to Prudencio's will and trust is made some 11 years after Prudencio's death. During this time witnesses have died, documents have been lost, and memories have faded. Prudencio's wife, Carolina, died in 1984. Carolina's sister, Ana Maria Casal, died in 1985. Both of these individuals would have been important witnesses. They could have provided significant insight into Prudencio's intentions regarding domicile.

This delay has created problems for all of the parties, including Charles. The evaluation of testimony regarding the content of conversations with now deceased declarants is an important element in this case.

Charles' testimony regarding one such conversation is particularly harmful to his credibility. Charles provided a detailed account of his meeting with Ramona Falero in either 1966 or 1967. She is claimed to be the mother of Prudencio's illegitimate son. However, when Charles was presented with record proof that Ramona died in 1963 he did not retreat from his position. Even if it is assumed that Charles met Ramona at an earlier date and that Charles' faulty recollection of the date of that meeting is attributed to the passage of time, Charles' adherence to clearly erroneous testimony shows a disregard for the truth. Such conduct, at the very least, casts doubt upon the accuracy of Charles' other testimony regarding his conversations with deceased declarants.

Another area of testimony adversely affects Charles' credibility. He claims that in 1972 he was unaware of Prudencio's 1970 trust and that in 1974 he knew it existed but did not know who the beneficiaries were. Yet, several documents were appended to and incorporated into the 1972 settlement agreement which evidenced the existence of the trust and stated that Charles' brothers were named trustees thereunder.[6]

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[6] Both the 1972 and 1974 settlements are discussed in Appendix I to this opinion.

In denying that he saw these documents at the 1972 closing, Charles stated that he then initialled each document presented to him. He asserts that the documents in question do not bear his initials and thus, he had not seen them. He did not change his testimony even when confronted with the fact that he did not initial all the documents he acknowledged that he had received at the closing. Furthermore, when Charles was made aware of his 1988 deposition testimony—in which he stated that he knew of the trust in 1972, and had seen documents which referred to the trust at that time—, Charles continued to insist that his 1988 deposition testimony was not true. Once again, Charles adhered to testimony which had been discredited. In order to support his now suspect claims, Charles was willing to discredit his own prior deposition testimony. This is indicative of how Charles will not back away from current testimony which is proven to be unbelievable. Charles eventually admitted that he was aware of the trust in 1972 and that as of 1974, he already knew that he and his brothers were not heirs under Prudencio's estate plan. Notably, this change in Charles' testimony indicates that his 1988 deposition testimony was true, and Charles' initial discrediting of the deposition testimony clearly demonstrates his endeavor to mold events of the past to fit his present claims.

Charles' explanations, where they exist, of the foregoing inconsistencies are fictive an very technical. They just do not wash. They evidence a clear endeavor to walk away from prior testimony or assertions which then served his interest but no longer do.

Both Joseph and Frank, apparently in an endeavor to show Prudencio's non-attachment to Puerto Rico, minimized Prudencio's involvement in the Puerto Rican companies by testifying that the sons owned the companies and essentially he simply gave advice to them with respect to the companies' operations and checked the running of the plant when in Puerto Rico; whereas with respect to Goya,

Prudencio ran it and made the final decisions. A realistic appraisal of all of the relevant evidence, however, shows that Prudencio had a very significant role in the operation of these companies. It is not inappropriate to conclude, as I have below, that he had the final say on all important managerial decisions in these companies, as well as Goya.

In Joseph's testimony in the Delaware Federal Court removal action, where it was of importance for him to establish that Charles was not domiciled in Puerto Rico, he testified that Prudencio's stays in the Kings Court condominium approximated 5 to 7 months during the periods from the end of November 1966 through May 1969. In the present trial, however, his testimony was that, except for the year 1968, when he was hospitalized in Puerto Rico, Prudencio's stays in Puerto Rico through April 1970 were generally some time in November until some time in April—about 5 months per year. Such 5 months stays are substantially supported by entries in Carolina's diaries for various years commencing 1960 and ending in 1966, as well as other evidence.

In a deposition Joseph stated that the Kings Court condominium was purchased in Charles' name so that he would have a Puerto Rican address for tax purposes but it was meant to serve as a residence for his parents for their stays in Puerto Rico. But at trial he testified that it was bought as a residence for Charles which his parents could use on their winter trips to Puerto Rico.

In Joseph's May 1988 deposition he stated that after Prudencio's death and the sale of the Tenafly home, Carolina lived with Joseph in Alpine, New Jersey. At trial, however, he admitted that she never lived in Alpine; rather, she had asked Joseph, when the Tenafly house was sold, if she could use his Alpine address while she stayed on in Puerto Rico.

At trial Joseph testified that after Prudencio's death, Carolina authorized him to lease the Tenafly home to an

employee of Goya with an option to buy; but that lease was never signed. He later denied giving the employee, Andrew Aroyo, an option to buy despite that employee's credible testimony to the contrary.

There may be other discrepancies in or tilting of testimony by Joseph. But over all, I find that basically he was a truthful witness at trial, who was open with the court and quite willing to admit prior inconsistencies in testimony. The differences between his trial testimony and that in other court proceedings are in no sense as deliberate or egregious as those of Charles.

Frank testified that Prudencio and Carolina selected the Tenafly home in or before June 1962 from houses they were shown, before it was purchased. From other credible evidence at trial, it is evident that this is just not true. The house was actually selected by Charles and Frank, and title closed on June 26, 1962. But before title closed in June 1962 and before they moved in, Prudencio and Carolina had seen the Tenafly house. They had returned to a Bogota house from Puerto Rico by that date. Frank and his wife were then also residing in the Bogota residence until they were able to move to their newly-acquired home in Demarest. When Frank moved to Demarest, Joseph and his family moved into the Bogota house. This occurred on or about July 3, 1962. At that time Carolina and Prudencio were also still living in Bogota. They had intended to move to Tenafly a few days earlier but Ana Maria was in the hospital and was discharged July 16, 1962. Joseph and his family resided in Bogota with Prudencio and Carolina for about ten days. On or about July 16, 1962, Prudencio, Carolina and Ana Maria moved to Tenafly.

It is evident from the testimony of all family members and others, except that of Frank, that Carolina, whose primary language was Spanish, was not fluent in English, either conversationally or in writing but that, to quote Carmen Ana Unanue, she made herself understood in

English.[7] Nevertheless, Frank insisted that she was not only well-spoken in English but could also write well in that language and that she taught her sons to type in English. He later indicated that he could not recall whether the typing lessons were given from a book in Spanish. In any event, as I see it, this testimony is merely part of his endeavor to counteract Charles' claim that Carolina felt more comfortable with Spanish-speaking people and thus persuaded Prudencio to move permanently to Puerto Rico, as their domicile.

Frank could not recall whether, or refused to acknowledge that, Caribbean Canneries tax-free dividends were paid either directly or indirectly, to the 4 brothers in the sum of $20,000 each in 1968. This testimony is difficult to believe in view of the sums involved. He may have so testified because there is the Problem of whether tax-free distributions were made to brothers not qualified by law to receive them, either as non-shareholders or as non-residents of Puerto Rico.

In my view, however, these weaknesses in Frank's testimony do not adversely affect the trustworthiness of other significant evidence which he gave.

The foregoing discrepancies in the testimony of Charles, Joseph and Frank are not at all exhaustive. There are other instances. But, on the whole, I find that the witnesses and other evidence adduced by plaintiffs to be so superior in trustworthiness and reliability to those of Charles as to justify a finding—factually and legally—that on November 16, 1970, the date of execution of the trust, and on March 17, 1976, the date of Prudencio's death, Prudencio's domicile was in Tenafly, New Jersey.

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[7] There is credible evidence that, while on vacation in Spain in 1961 without Ana Maria, she wrote postcards and even a letter to neighbors and friends in Bogota, which must have been in English.

LAW OF DOMICILE

The following represents the New Jersey law of domicile, with the exception of the matter of burden of proof and going forward with evidence.

"In a strict legal sense, the domicile of a person is the place where he has his true, fixed, permanent home and principal establishment, and to which whenever he is absent, he has the intention of returning, and from which he has no present intention of moving." *Kurilla v. Roth*, 132 *N.J.L.* 213, 215 (Sup. Ct. 1944). This identification of domicile with the concept of home continues to have vitality in New Jersey. *See, Citizens Bank & Trust Co. v. Glaser*, 70 *N.J.* 72 (1976). "Home is the place where a person dwells and which is the center of his domestic, social and civil life." *Citizens Bank & Trust Co. v. Glaser*, 70 *N.J.* at 81, *quoting Restatement 2d, Conflict of Laws* (1971), § 12. In that case, the court stated that "the overwhelming proportion of the indicia as to what the decedent regarded as her real, principal and permanent home . . . as well as the central fulcrum of her life must here be found to converge . . ." in that location found to be her domicile. *Citizens Bank & Trust Co. v. Glaser*, *supra* at 82. Thus, the concepts of home and domicile mean more than physical residence. They also embody the subject's objective and subjective relationship to that residence.

A person may establish a domicile in one place and then acquire a second residence. This does not lead to multiple domiciles, for it "is everywhere conceded that a person can have only one true domicile, which is synonymous with the common understanding of the word 'home.'" *State v. Benny*, 20 *N.J.* 238, 251 (1955). If a person maintains multiple residences it may become necessary to determine which one is the true domicile. Various approaches to this problem have been used by New Jersey courts.

Establishing a domicile involves an act volition. "A person has the right to choose his own domicile, and his motive in doing so is immaterial." *Lyon v. Glaser*, 60 *N.J.* 259, 264 (1972). In accordance with this principle it has been held that one does not relinquish his domicile by having another residence based on reasons of health, society, business or employment. *See Rosenberg v. Universal Underwriters Insurance Co.*, 217 *N.J. Super.* 249, 256 (Law Div. 1986), *aff'd* 224 *N.J. Super.* 638 (App. Div. 1988), certif. den. 113 *N.J.* 333 (1988); *Collins v. Yancey*, 55 *N.J. Super.* 514, 521 (Law Div. 1959); *Cromwell v. Neeld*, 15 *N.J. Super.* 296, 301 (App. Div. 1957); *In re Michelsohn*, 136 *N.J. Eq.* 387, 390 (Prerog. Ct. 1944). Additionally, it has been held that a change of domicile "may be made to avoid taxation . . . [or some other motive], so long as the necessary ingredients for establishment of the new domicile are present." *Lyon v. Glaser*, 60 *N.J.* at 264. Even a change of domicile predicated on a desire to avoid a forced heirship statute has been upheld when the change was supported by other indicia of a new domicile, *Succession of Barnes*, 490 *So.2d* 630 (La. App. 2 Cir. 1986).

It is clear, therefore, that a choice of domicile by a person, irrespective of his motive, will be honored by the court, provided there are sufficient objective indicia, by way of proofs, supporting the actual existence of that domicile.

Thus, a person may not arbitrarily designate a given residence as his domicile. It is necessary that the requisite subjective intent be present since domicile is "very much a matter of the mind—of intention." *Lyon v. Glaser, supra.* "Where there are multiple residences . . . domicile is that place which the subject regards as his true and permanent home." *Citizens Bank & Trust Co. v. Glaser, supra* at 81.

"When a man has acquired a domicile in a particular place, that place remains his domicile until he acquires another domicile." *In re Dorrance,* 115 *N.J. Eq.* 268, 274 (Prerog. Ct. 1934), aff'd 13 *N.J. Misc.* 168 (Sup. Ct. 1935), aff'd 116 *N.J. L.* 362 (E & A 1936), cert. den. 298 U.S. 678 (1936), reh. den. 298 U.S. 692 (1936). In considering whether a change of domicile has occurred, three elements must be considered: 1) whether there had been an actual and physical taking up of an abode in a partilcular state; 2) whether the subject had an intention to make his home there permanently or least indefinitely; and 3) whether the subject had an intention to abandon his old domicile. The court must evaluate all of the facts of the case to determine the place in which there is the necessary concurrence of physical presence and an intention to make that place one's home. *Lyon v. Glaser, supra,* at 264-265. *See also Mercadante v. The City of Paterson,* 111 *N.J. Super.* 35, 39-40 (Ch. Div. 1970), aff'd *o.b.* 58 *N.J.* 112 (1971).

In the *Lyon* case, as well as in its companion case, *O'Hara v. Glaser,* 60 *N.J.* 239 (1972), the Supreme Court focused particular attention on the subjects' intention to abandon their old domiciles. In *O'Hara,* the Court found ". . . the critically important factor here is that regardless of where she lived on coming to Florida Miss Johnston's decision had been made to abandon her domicile in New Jersey and maintain a permanent abode in Florida." 60 *N.J.* at 248-249. Likewise in *Lyon,* the Court found that on "the proof here, we regard as irresistible the conclusion that long before Mrs. Lyon died her intention to abandon her New Jersey home and to spend the rest of her life with her son in Baltimore, except for an annual visit to [New Jersey to see friends and visit her husband's grave], . . . had come to full fruition." 60 *N.J.* at 278-279. On the other hand, in *Cromwell v. Neeld, supra,* the Appellate Division found that the subject had not been shown to have abandoned her New Jersey domicile in favor of a

New York residence, despite the fact that she had spent the last five and a half years of her life and died at the New York residence. 15 *N.J. Super.* at 302, 304-305.

New Jersey courts also consistently hold that once established, a domicile continues until superseded by a new domicile. *See, e.g., Lyon v. Glaser, supra; Cromwell v. Neeld, supra; In re Dorrance, supra.* Accordingly, once one party in a domicile contest establishes firmly that the subject was domiciled in a particular location at a particular time, if the adverse party seeks to establish that the subject was ultimately domiciled in some different location, he must demonstrate, in accordance with the types of evidence and standards discussed herein, and the proof burdens hereafter set forth, that the subject did in fact effect a change of domicile.

Subject to contradiction, recitals as to domicile in a will, trust, tax return or other formal document, as well as statements to others as to domicile, are evidential of the actual domicile. But they are not at all conclusive. They are of value evidentially to the extent that they are not intended to deceive and other proofs support such domicile. The same principle applies to a provision in a will or trust, stating that the laws of a specific state shall govern or that it shall be administered in accordance with the law of such a state, at least where the residence expressed therein of the testator or settlor is in that state. *Trustees of Princeton University v. Trust Co. of N.J., supra,* 22 *N.J.* at 595-596; *Lyon v. Glaser, supra,* 60 *N.J.* at 267; *Cromwell v. Neeld, supra,* 15 *N.J. Super.* at 304. *Cf. In Re Pfizer,* 33 *N.J. Super.* 242 (Ch. Div. 1954) *aff'd* o.b. 17 *N.J.* 40 (1954).

FINDINGS

Based on all of the credible evidence and the stipulated facts, I make the following findings of fact and conclusions of law:

Prudencio, born Spain on April 6, 1886, came from Spain with his uncle Julian Ortiz, to San Juan, Puerto Rico on Febraruy 3, 1904 by ship, the Olinde Rodriguez. The ship made a stop at St. Thomas in the then Danish Virgin Islands en route to Puerto Rico, then a United States colony.

Until 1908, he worked at a yard goods store owned by relatives. In 1908 he moved to San Lorenzo, Puerto Rico, a small town about 25 miles south of San Juan, became a salesman, a manager of a store, and then part owner of a dry goods or general store on the main street of the town.

Prudencio became friendly with Ramona Falera in San Lorenzo. She later claimed that he was the father of her child, Augusto Falero (Augusto or Falero), born in 1911. Whether he was in fact the father of Augusto need not be, and is not, decided in this case. There is, however sufficient evidence to warrant a finding, which is hereby made, that Prudencio believed, whether correctly or not, that Augusto was his son by Ramona. Such evidence includes payment for Augusto's support by Prudencio; the testimony of members of the Falero family; and a $3,000 devise to Augusto in Prudencio's wills executed in 1962 and thereafter until October 24, 1968 and his probated Will of November 16, 1970, when the amount was increased to $5,000. In the last Will Augusto was designated as "my friend".

In 1911 Prudencio became engaged to Carolina, who was then residing in San Lorenzo with her deceased mother's relatives named Valdes. Carolina came to Puerto Rico from Spain in 1906, when she was about 16 years of age.[8] Her younger sister Ana Maria was born in Puerto

[8] It appears that Carolina may have made a trip to Spain after her 1906 arrival in Puerto Rico, since her petition for naturalization states that her lawful admission for permanent residence in the United States was at San Juan, Puerto Rico on November 29, 1911 on the SS Manuel Calvo. There is evidence that the ship ar-

Rico during one of their parents' trips to Puerto Rico from Spain. After their mother's death in Spain, their father, Antonio Casal Soto, brought his two daughters to reside in Puerto Rico with his deceased wife's family. He then returned to Spain.

In 1914 and 1915, Prudencio left Puerto Rico to go to Spain and France. While he was away his business was managed by relative who permitted it to detioriate. In October 1915 he returned to Puerto Rico, rehabilitated the business and sold it.

In 1916, Prudencio went from Puerto Rico to the continental United States. From 1916 to 1918 he studied business and the English language in Connecitcut and Albany Business College, Albany, New York, graduating from the latter's bookkeeping department in March 1918.

In 1918 and 1919, he worked for a customs house broker, and resided, in New York City.

In 1921 he returned to San Lorenzo to marry Carolina. They were married on November 4, 1921. The marirage certificate explicitly states that Prudencio was then a "vecino de" ("resident of") New York and Carolina, a "vecina de" ("resident of") San Lorenzo.

Their first child, Charles, was born in Puerto Rico on August 22, 1922. Prudencio was in Brooklyn, New York at the time of his birth, having left Puerto Rico soon after his marriage in order to earn a livelihood for himself and Carolina in the New York City area.

In 1923 Carolina joined Prudencio in Brooklyn and Charles stayed in San Lorenzo with his aunt Ana Maria and other members of the family. In either late 1923 or in 1924 Charles was brought to Brooklyn to live with his

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rived in San Juan from Cadiz, Spain on November 29, 1911. The record is barren of any evidence as to why the 1911 date, rather than the earlier 1906 date, was used in the petition. Charles' speculations as to the reason are unpersuasive.

parents by, among others, Ana Maria, and a maid. Ana Maria returned to San Lorenzo, where she continued to reside with members of her family. Pepe, one of the brothers of Carolina and Ana Maria, also resided there. For about one year in the 1930's, Ana Maria and Pepe lived with their brother Ulpiano Casal Valdes and his wife Santos in San Juan.

During the 1920's and 1930's Prudencio worked in New York City. From 1924 to 1929, he and Carolina and their children resided in Brooklyn, New York at various addresses.

Joseph was born in a Brooklyn apartment on March 13, 1925. Anthony was born in Brooklyn on July 19, 1927.

In August 1929 Prudencio moved his family from Brooklyn to New Jersey. From August 1929 until 1934, they resided in a rented house in Ridgefield Park, New Jersey. Frank was born at this house on June 17, 1931.

Soon thereafter Ana Maria and Pepe left San Juan and went to live with Carolina, Prudenzio and their children in Ridgefield Park.

In 1934, the Unanue family, with Ana Maria and Pepe, moved into a rented house at 187 Larch Avenue, Bogota, New Jersey. In that year Carolina's father Antonio joined the family and resided with them in the Bogota house. Two years later he died and was buried in Hackensack, New Jersey.

In January 1937 the Larch Avenue, Bogota, house was purchased in the name of Carolina. It appears that title was taken in that fashion since Prudencio was concerned about the possibility of the house's becoming an asset that would be available to his business creditors. Prudencio and his family lived in this house for 28 years, from 1934 to 1962.

Although Charles spent his first two years of grammar school in Brooklyn, subsequently he, Joseph, Anthony and Frank grew up in Bergen County, New Jersey. All four attended grammar school in Ridgefield Park and Bogota, followed by four years at St. Cecilia's High School in Englewood. They celebrated their religious observances and ceremonies (such as their First Communion) at Catholic churches in Ridgefield Park and Bogota. The Bogota church was St. Joseph's. This was the church the family attended during their lengthy residence in the Bogota house.

The four sons served in the armed forces during and after World War II. Each enlisted or was drafted from the Bogota house address and returned there during furloughs. After completing military service, Charles, Joseph and Anthony attended college in the continental United States and obtained engineering degrees. Frank went to Stevens Tech in Hoboken, New Jersey but his education was interrupted by service in the Army. Throughout their attendance at school and college and their military service and until their respective marriages, the four sons resided with their parents in Bogota.

Charles, the oldest son, was married to his first wife Lois in New York in 1951 and moved out of the Bogota home. After a Mexican divorce, Charles was married to his present wife, Liliane, on November 11, 1967 in Connecticut. There was a later divorce from Lois in April 1970 in the New York court.

Joseph married Carmen Ana, his cousin on his mother's side, and a resident of Puerto Rico, in Puerto Rico in February, 1956 and left the Bogota house [9]. Anthony was married in 1951 in Washington, D.C., and thereupon left Bogota. Frank was married in Puerto Rico in November

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[9] Joseph's wife Carmen Ana is a daughter of Carolina's brother Ulpiano Casal Valdes and his wife Santos. She is thus also Joseph's cousin.

1961 to a resident of Puerto Rico. He resided in the Bogota home thereafter while Prudencio and Carolina were on their winter stay in Puerto Rico and after their return, until on or about some time in July, 1962, when he and his wife moved to their new home in Demarest, New Jersey.

Prudencio became a United States citizen in February, 1946. Carolina became a United States citizen in September, 1956. Prudencio's and Carolina's respective naturalization applications were made at the Court of Common Pleas in Bergen County, New Jersey. Prudencio and Carolina each gave as an address or residence, 187 Larch Avenue, Bogota, New Jersey. Prudencio and Carolina each listed as witnesses to the naturalization applications neighbors in Bogota. The witnesses on behalf of Prudencio's naturalization application attested that they had known him personally since 1935 and that he had resided continuously in Bogota, New Jersey since that date. The witnesses on behalf of Carolina's naturalization application attested that they had known her personally since 1950 and that she had resided continuously in Bogota, New Jersey at least since that date.

Neither Prudencio nor Carolina visited Puerto Rico from 1923, when Carolina came to live with Prudencio in Brooklyn, until sometime in 1949 or 1950, a period of some 26 or 27 years.

A brief history of Prudencio's New York business and the Puerto Rican companies is now in order.

His business was first headquartered at 100 Hudson Street, Manhattan. In 1929, he formed a New York corporation known as Unanue Inc. That company was dissolved by him in 1939. In 1936, however, the business which ultimately became the very substantial Goya Foods, Inc. was founded by Prudencio as a sole proprietorship in New York City. In 1946 it was incorporated as Unanue & Sons, Inc. In 1958 its headquarters were moved

from Manhattan to 25-12th Street in Brooklyn. Its name was officially changed to Goya Foods, Inc. on May 25, 1961. Goya moved to Secaucus, New Jersey in December 1974. The inauguration ceremony for the Secaucus facility was in September 1975. Each of the sons joined the business when he became of age.

In 1949, Prudencio had instructed Charles to endeavor to purchase a small bankrupt food processing plant or cannery in Rio Piedras, Puerto Rico, which Prudencio had learned was for sale. Charles went to Puerto Rico for that purpose and acquired the facility for a purchase price paid by Prudencio. Prudencio made a short visit to inspect the plant in 1949 or 1950, after its acquisition. This was the first time in his 28 years in the United States that he had visited Puerto Rico. He was then about 64 years of age.

This plant served as the nucleus for the incorporation and operation of Puerto Rico Food Products Corp. and the later Caribbean Canneries, Inc., both of which are located in Bayamon, Puerto Rico. Indeed, the Goya name is on the Bayamon building.

In 1951 Charles was President of Unanue & Sons, Inc., which later became Goya. Prudencia was Chairman of the Board. In 1952 Charles, who was then in Puerto Rico, also became President of Puerto Rico Food Products Corp. In the second half of 1955 through the first half of 1962, Charles resided in New Jersey and worked primarily at Goya in New York, although he worked at the Puerto Rico facilities about three days per month. He returned to Puerto Rico in 1962 and was President of Puerto Rico Food Products, Vice President of Caribbean Canneries and Executive Vice President of Goya. Between 1965 and 1969, he split his time between Goya in New York and the Puerto Rican companies. By 1969 he had become Chief Operating Officer and Chief Executive Officer of all the companies. In June 1969, he was dismissed as an employee and officer, as well as director, of

all of the companies.[10] The reasons for his dismissal and his estrangement thereafter from Prudencio, Carolina and his brothers are set forth in Appendix I to this opinion.

Meanwhile, in January 1950 Prudencio and Carolina commenced making temporary visits to Puerto Rico. At first they stayed with Carolina's brother, Ulpiano Casal Valdes. They thereafter stayed at various residences owned by one of their sons or owned or rented by Puerto Rican companies, including Puerto Rico Food Products Corp., owned by their sons.

Commencing in the late 1950's, Prudencio and Carolina, who then resided in Bogota, New Jersey, began routinely to spend the winter months of each year in Puerto Rico—usually from some time in November of each year (generally after Thangsgiving in Bogota) until March or April (generally around Easter) of the following year.

Prudencio's winter visits to Puerto Rico were primarily taken because of pain and discomfort caused by an arthritic condition which began in the 1940's and forced him to walk with a cane by the mid-1950's. During the 1960's, Prudencio's arthritic condition worsened further, and he obtained motorized wheelchairs which he used to travel around the company offices both in New York and in Puerto Rico. The cold New Jersey winters exacerbated the pain resulting from his arthritis. Additionally, he was

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[10] From August 1966 through 1976 Joseph resided in New Jersey and was responsible for the operation of Goya. He was also an officer of Goya.

Anthony worked for Goya in New York, and from August 1966 up to mid-1973 he split responsibilities with Joseph at Goya. Anthony went to Spain in the last half of 1973, where he set up and operated Goya en Espana until be became terminally ill with leukemia in late 1975, at which time he returned to New Jersey.

From 1955 until 1966 Frank resided in New Jersey and worked for Goya. From 1966 through 1976 he resided in Puerto Rico and was general manager of Puerto Rico Food Products and Caribbean Canneries. In 1969, he became President of Puerto Rico Food Products. He was also an officer of Goya.

afraid he might fall on the ice or snow during the New Jersey cold weather. Prudencio, who was 70 years old in 1956 and 80 years old in 1966, used his trips to Puerto Rico to escape these winters.[11]

As indicated, while in Puerto Rico, during the 20 years of annual visits there, Prudencio and Carolina would usually stay in various residences (generally apartments) owned or leased by a Puerto Rico company owned by their sons. None of them was owned or leased by Prudencio or Carolina. The apartments varied. Among others, there was a one-room efficiency apartment and an apartment over a retail store.

The last of these company apartments in Puerto Rico was located at 54 Kings Court, Santurce in a building known as Condominium Ashford Park (sometimes "Kings Court apartment"). This apartment was purchased on November 11, 1966 and owned by Charles, who ultimately, in November, 1968, sold it to the Puerto Rico company.

The New Jersey houses of Prudencio and Carolina were larger and far more comfortable than the apartments in Puerto Rico in which they stayed during their winter visits.

In July 1962, Prudencio and Carolina moved from the Bogota residence to a house at 13 North Summit Street in Tenafly, New Jersey.

Prudencio's move from Bogota to Tenafly was prompted by his desire not to climb stairs any longer as a result of his severe arthritic condition.

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[11] A letter of November 10, 1969 by Carolina to Frank and his wife, (who were in Puerto Rico) sent from Tenafly, states that although they wanted to spend more time in Tenafly, it was "quite cold, weather has been real bad with a constant cold drizzle, over a week now;" and that they would be in Puerto Rico on November 21.

The Tenafly house was a bick ranch-style house on one level, with few steps and with the bedrooms and two bathrooms on the main floor. By contrast, the Bogota house was a three-story colonial with steps in front and between the floors and with all but one bedroom and the bathrooms on the second and third floor.

A more detailed description of both of these houses by Joseph F. Unanue conforms essentially to that given by other credible witnesses. I accept that description as fact:

The Bogota house had three stories. There were one bedroom and a den on the first floor; 4 bedrooms and bathroom on the second floor; and 2 bedrooms and a small bathroom on the third floor. In the basement there was a bathroom, poolroom, and a playroom with a bar. To get to the second floor it was necessary to climb 1¼ flights of stairs. The house had a front lawn and a back-yard.

The Tenafly house was a fairly large one story brick building with a large basement. It had a substantial yard, many trees, a barbecue and a basketball court. There was a living room, dining room, kitchen, 4 bedrooms and 2 bathrooms. One of the bedrooms was used as a sewing room. The house had been fully furnished by two interior decorators selected by the wives of Charles and Frank.

The new Tenafly house was chosen and purchased in May 1962 by Charles and Frank for use by their parents. The title was taken in Charles' name by deed of June 26, 1962. He transferred title to Goya Foods, Inc. on July 9, 1962.

The Bogota house was occupied by Joseph Unanue and his family in 1962. In November 1965, Joseph and his wife purchased this house from Prudencio and Carolina. Soon thereafter in May, 1966, Prudencio purchased the Tenafly house from Goya, placing it in Carolina's name.

Carolina loved gardening and grew flowers and shrubs outside the family homes in both Bogota and Tenafly.

Prudencio and Carolina enjoyed their New Jersey houses and considered them as home. Prudencio showed the houses with pride to his friends and visitors. He and Carolina were deeply interested in their family—their sons and spouses and their grandchildren. They were concerned with the grandchildren's welfare. The grandchildren, from time to time, visited at the Bogota and Tenafly houses with and without their parents. Most of them were located in the New Jersey area or in places readily accessible thereto. Some of them stayed over on weekends or longer. They played with children of neighbors, both in Bogota and Tenafly. Prudencio enjoyed talking to them and watching them play.

Prudencio and Carolina's valuables and sentimentally significant possessions (such as silver, jewelry and prayer books) were always kept in the New Jersey houses in Bogota and Tenafly. When Prudencio and Carolina went to Puerto Rico in November 1970 and in prior years, they took with them only clothing and personal effects in 2 or 3 suitcases. They left the Tenafly house with all of the furniture, most of their clothing and other personalty therein intact. The silver in the Tenafly house was later stolen in 1975 during what appeared to be a break-in. In November 1970, they intended to return to Tenafly, despite Prudencio's advanced age—84.

Prudencio voted in Bogota for Dewey in the election of 1948. He also voted in Bogota in other elections, including 1952 when he voted for Eisenhowever. He never voted in any Puerto Rican election. He gave money to the Community Chests of Bogota and, at least in 1962, Tenafly. He had a New Jersey driver's license until the early 1960's, when he stopped driving, and never had one from Puerto Rico. He never paid any income tax in Puerto Rico. He had a bank account in the Bank of Bogota for some period, including the years 1960 and 1962. issuing checks therefrom in July 1960 and September and October 1962. He also had a checking account

at the Hackensack Trust Company at some period, including the year 1963. His bank accounts listed his new Jersey address. Although Carolina had a savings account in Puerto Rico, Prudencio had no bank accounts there. He received his Social Security number in New York and Carolina received hers in New Jersey. His 1957 and 1961 passports and 1957 passport application show his address as his house in Bogota; and his 1966 passport application shows his address at his Tenafly house. The references to a Bogota, New Jersey residence in the naturalization papers have already been discussed.

During their absences in Puerto Rico before and after November 1970, the Federal and the New York State and City non-resident income tax returns filed for Prudencio and Carolina contained their New Jersey address as their "home" address. Prudencio's wills, including the November 1970 will, and the November 1970 Trust, recited his New Jersey residence. Prudencio's November 1970 Will incorporated the provisions of the Trust, executed on the same day, to the effect that it shall be construed under, and the shares thereunder shall be governed in all respects by, New Jersey law. Carolina executed a will dated October 24, 1964 in which she describes herself as a resident of New Jersey.[12]

Prudencio executed contracts in New York City with his four sons, including Charles, as parties, in which he was described as "a resident of the State of New Jersey". These documents were signed by Prudencio on July 17, 1964, April 22, 1966, and June 20, 1967. Prudencio executed two affidavits in 1969, —on June 4 and June 13 —, in which he swore under oath that his residence was 13 North Summit Street, Tenafly, New Jersey. There are a great number of other documents throughout the years signed by Prudencio in which he referred to his residence as New Jersey.

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[12] Unusual provisions in Prudencio's earlier wills and Carolina's will are discussed hereafter in connection with Charles' fictional New Jersey domicile contention.

While Prudencio and Carolina were in Puerto Rico, both before and after November 1970, the Tenafly house was looked after, from time to time, by Joseph and his wife Carmen Ana, as well as their son, Joseph F. Unanue. They also picked up the mail for Prudencio and Carolina, including their social security checks and checks from the Finca Carolina, Puerto Rican farm. This caretaking included the job of having the garden taken care of and responding to emergencies. In 1971 or 1972, the pipes burst. Carmen Ana had the necessary repairs made so that Prudencio and Carolina could return to a fully intact livable house.

I find that Prudencio in fact left for Puerto Rico in the second half of November 1970 and did not thereafter return to the United States.[13] He was not in Puerto Rico in the summer of 1970 or October 1970.

Charles' witnesses, Joseph Alvarez, an employee of Goya and later the Puerto Rico companies, and his son Adelberto, gave testimony that, if accurate, would support a claim that Prudencio was in Puerto Rico in July, August and October 1970.

Joseph Alvarez stated that he was then working for the Puerto Rican companies. He said that he saw Prudencio in Puerto Rico in July and August 1970 and took Prudencio to the airport in Puerto Rico in October 1970 for a trip to New York. But other evidence in the case, including company records, showing that Joseph worked at Goya New York in 1970, is plainly more believable and persuasive. The testimony of both Joseph and Adelberto understandably may be the result of faulty and hazy recollections of the time in which the events involved occurred. However, after observing Joseph Al-

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[13] It should be noted that on July 8, 1970, Carolina sent a letter from Tenafly to Frank, in Puerto Rico, clearly evidencing the fact that in July 1970, they were living in Tenafly. Prudencio also executed wills in Brooklyn, New York, in October and November, 1970.

varez and his son as witnesses and considering all of their testimony, as well as other credible evidence in this case, I am satisfied that their testimony does not have the ring of truth.[14]

Prior to departure for Puerto Rico in November, 1970, Prudencio said goodbye to the Goya sales staff, at a sales meeting, in the same manner as in prior years, when he left for his winter stays. This parting conversation was in Spanish, and at its conclusion Prudencio said "Hasta la vista," which means either "until later," or "until I see you again." If Prudencio had decided, as of November , 1970, never to return to the United States, he did not indicate that to his salesmen. He left them with the impression that he would return.

Evidence that Prudencio was expected to return is found in the testimony of Joseph Unanue and also in the testimony of Hugo Acierno, a Goya salesmen and Charles' witness. He testified that he began working for Goya in New York in February, 1970. Acierno recalled that he never saw Prudencio in 1970 in the Goya facility. According to Acierno, he fully expected to see Prudencio at that time, since other Goya salesmen told him that Prudencio would meet with them in July or August of 1970 to discuss the sales of Christmas candy.

Acierno's recollection that he began working at Goya in 1970 is inaccurate. Despite his attack on the 1971 date in his employment application, I am satisfied that the date stated thereon, January 15, 1971 is correct. Acierno could not have worked for Goya in 1970. Since he began working for Goya in 1971, he could not have met Prudencio during his first year of employment with Goya, for Prudencio remained in Puerto Rico continuously

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[14] Among other evidence, there is the testimony of Cristobal Colon, an employee of the Puerto Rican companies who spoke to Joseph Alvarez in 1989. I find him to be a most credible witness. During the discussion Alvarez told him that he did not then remember the last time he had seen Prudencio.

from November 1970 until his death in March 1976. However, the fact that Acierno expected to meet Prudencio in July or August of 1971 is further evidence of the fact that Prudencio was expected by the Goya salesmen to return to the United States.

Additionally, Acierno recalled that the salesmen also expected to meet with Prudencio during Acierno's second year with Goya. That second year of employment in fact was 1972. A reasonable inference thus may be made that, despite the fact that Prudencio suffered a stroke in January, 1972, he was still expected to return to New York to meet with the Goya sales staff in July or August of 1972.

Despite the attempt during the testimony of Joseph and Frank to minimize Prudencio's role and participation in the Puerto Rico companies, there is no doubt that from the very beginning, when the first Puerto Rico plant was purchased in 1949, Prudencio was the "boss" of the Puerto Rico companies as well as Goya in New York. Little, if anything, of moment was done without his consultation, advice and approval either with respect to the Puerto Rico companies or Goya (New York). The brothers were the sole stockholders, directors and officers of the Puerto Rico enterprises but the active and pervasive force behind it all was Prudencio. The setting up of the Puerto Rico companies so that the brothers were the sole shareholders was simply a tax savings device: The companies generated tax free income under Puerto Rico law and if it was distributed by way of dividends, it would be distributed to the four brothers either directly or indirectly; and Prudencio, who did not need the income, would thus not be required to pay additional income taxes. Further, it was a method of shifting income from Goya, the majority of whose stock was owned by Prudencio, to his sons, the next generation, through their ownership of the Puerto Rican companies. Additionally, such ownership would minimize estate and inheritance taxes payable at Prudencio's death.

The Puerto Rican companies, Caribbean Canneries and Puerto Rico Food Products, had substantial earnings and profits. Prudencio was obviously interested in their operations, sales and profitability, as well as their being an excellent source of income to the members of the Unanue family. Nevertheless, his primary interest always remained with the financial success of Goya itself; and his true emotional attachment always was to Goya. He considered the Puerto Rican enterprises essentially as contributors to the over-all success of the Goya business, good-will and tradename he had founded and nourished. To him, Goya itself was the significant entity or enterprise. It was his center of gravity, both personally and as a matter of business. The financial success, sales and profitability of the Puerto Rican companies, including their tax exempt status, excited his interest, basically because they constituted a tangible extension to Puerto Rico of the success and reputation of *his Goya* company, as well as a source of products and income to *his* Goya company.[15]

In sum, it was Goya, the largest and most substantial sales operation, which was the center of his business and personal life, rather than the canning and related enterprises in Puerto Rico. His basic interest was sales. Just about every witness who knew him in business characterized him as the "super salesman" and considered salesmanship his abiding concern.

Goya was primarily a sales operation and a distributor and the hub of the business. The role of the Puerto Rican companies, principally a manufacturing enterprise,

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[15] This finding in no way minimizes the fact that actually, even prior to Prudencio's death, Goya sold items to supermarkets under brand names other than Goya with respect to products it purchased in the United States and which it distributed in the New York metropolitan area, Chicago and elsewhere; or that a substantial majority of the Goya-named products was sold to supermarkets in the United States rather than in Puerto Rico.

to a great extent, was to service and supply products to the Goya business in New York.

Among other things, Prudencio had a strong desire to assure a high quality of pigeon peas or gandules,—an item sold by Goya—,of which Puerto Ricans living in the metropolitan New York-Goya market area were particularly fond. He was thus on the look out for sufficiently reliable sources of gandules in Puerto Rico and, perhaps, elsewhere. Indeed, this may have been one of the reasons he initially sent Charles to seek out and acquire the first Puerto Rican operation. It also constituted one of the reasons he began making trips to Puerto Rico thereafter. The gandule season was from the end of December and ended in late March of each year.

Apart from his interest in gandules, on his visits to Puerto Rico he went to the Puerto Rican plants, watched production and operations, talked to his sons and was consulted by them with respect thereto, and was interested in seeing how the Puerto Rican facilities were progressing and what could be done to improve them. But the overriding reasons, of course, for his going to Puerto Rico, even in November 1970, were the warm weather, which was particularly favorable to his arthritic condition and his concern about falling on ice during the winter.

I find that up to the second half of November 1970, when he left to spend the winter months in Puerto Rico, Prudencio was clearly domiciled in New Jersey. His permanent home was here. His primary business enterprise, Goya, was in New York, to which he commuted from New Jersey to work 5 and 6 days per week. When he ceased driving a car, one of his sons who lived near him, took him to Goya. All of the indicia of New Jersey domicile were present. There existed a firmly rooted residence and intent to reside in New Jersey on a permanent basis. His annual trips to Puerto Rico for the winter seasons were essentially for health reasons, and, secondarily, for business purposes and a winter vaction.

Thus, as of November 16, 1970, the date of the trust, he was a domiciliary of this state.

Despite his intention to return to Tenafly after the November 1970 trip to Puerto Rico, Prudencio did not come back before he died in March 1976. It was during his last winter visit to Puerto Rico, starting November 1970, that he was beset with serious illnesses that continued until his death in March 1976. As a result, he thereafter continued to reside at the Kings Court apartment in Puerto Rico until he died.[16]

Some earlier history, however, is required.

In 1968, Prudencio remained in Puerto Rico longer than usual, since from June 4, 1968 until June 10, 1968, he was admitted to the Hospital Mimaya by Dr. Suarez. He was then 82 years of age. The final diagnosis of his condition was acute indigestion, chronic auricular fibrillation and diverticula of the sigmoid.

On October 22, 1968, while residing in Tenafly, he was seen by Dr. Myron Roberts, a urologist, at the Columbia Presbyterian Hospital, because of symptoms of progressive prostatism. At that time, Dr. Roberts, according to his letter of November 27, 1968 to the referring physician, Dr. Whitlock, stated that Prudencio had an enlarged prostate gland that was "clinically benign;" that he had a partially obstructing benign prostatic hypertrophy which had resulted in a lower urinary tract infection; that a course of urinary antiseptics be tried to clear his urinary tract infection and improve his voiding habits; that he was reluctant to advise a prostatectomy in an 82-year old man; and that he planned to recheck the patient's urine shortly after two weeks of medication.

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16 During 1971, and until his January 1972 stroke, to the extent his health permitted, Prudencio visited and worked at the Bayamon facility in Puerto Rico, but not as frequently or for as long as in previous years.

In April 1969, while in Puerto Rico, Prudencio was again hospitalized at Mimaya by Dr. Suarez, from April 25 to April 28, as a result of what appeared to be a stomach problem evidenced by nausea and vomiting. The hospital report shows that he suffered from recurrent lymphangitis of the right leg, leg ulcers, varicose veins, and arthritis in the lumbar region and hip joints. The final diagnosis, on his April 28, 1969 discharge, was acute gastritis, arteriosclerotic heart disease and chronic auricular fibrillation.

In June 1969, while residing in Tenafly, he was again examined by Dr. Roberts at Columbia Presbyterian Hospital in New York. Roberts felt a nodule in the prostate. He advised Prudencio that he should be admitted to the hospital so that a biopsy could be performed to detect whether or not he had prostrate cancer. On or about September 29, 1969, Prudencio went to the hospital for the biopsy and a cystoscopy. But, once there, he refused to have the procedures done and signed himself out. As a result, he was not then actually informed that he had cancer of the prostate.

On December 3, 1970, while in Puerto Rico at the Kings Court apartment, he was admitted by Dr. Suarez to the Hospital Mimaya. The hospital records indicate the following: He was nauseous, vomiting and thirsty. He had atrial fibrillation, arteriosclerotic heart disease, chronic nephritis, and increased uric acid. A diagnosis of cancer and ulcer of the stomach and prostatic disease was "discarded." He was to continue treatment at home.

Prudencio's first serious illness occurred during his November 1970 trip to Puerto Rico. On January 18, 1971, he was in pain and was brought by Cristobal Colon, an employee at the Puerto Rican facility, to the office of Dr. Ramon Almodovar, a urologist. He had a very distended bladder and had to be catheterized in order to empty it slowly. Almodovar had him immediately admitted to Teacher's Hospital (Del Maestro).

Almodovar found that Prudencio, who was then 84 years of age, had advanced carcinoma or cancer of the prostate; chronic uremia, a very serious illness; and severe chronic arthritis. The uremia had caused the vomiting and dehydration. At the request of Carolina and Frank, Almodovar did not tell Prudencio about his cancer. Prudencio was required to use a catheter both before and after he left the hospital on March 4, 1971.[17] There had been a remarkable recovery, according to Almodovar. Prudencio had informed him that he was a good doctor who had worked a miracle. Almodovar required the continued use of the catheter.

Almodovar had called in Dr. Juan Noguera, a cardiologist, to assist in the diagnosis and treatment of Prudencio during this hospital stay. Noguera concurred in Almodovar's diagnosis. Additionally, he found congestive heart failure and Prudencio left the hospital on March 4, 1971, he had shown a remarkable improvement. Prudencio was placed on heart medication as well as on diuretics. He concurred in Almodovar's statement that once Prudencio was catheterized, he felt much better. He saw Prudencio at home thereafter and at his office in April 1971, at which time he had put on substantial weight and was fatigued. When he saw Prudencio at his office visit of May 1, 1971, he appeared to be better but he was still having fibrillations. Noguera did not recall anyone, including Prudencio, asking at any time in 1971 whether he could travel. However, he stated that if he had been asked, he would have given permission to travel

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[17] Dr. Juan Noguera described a catheter as "a hollow tube mostly plastic nowadays . . . [it used to be rubber before], which you introduce into the urethra and it has a little bulb on the end and you fill that bulb up so that it doesn't pull back. You tie it down in the bladder and keep that canal open so that he [Prudencio] can continue to void. Remember he had an obstruction which was not relieved. But the catheter is hard, and you could maintain that prostrate away from deflating the urethra. You tie it to the leg. It's uncomfortable, but you can live with [it] for years."

on a 2 or 3 hour trip, since only minor precautions would have to be taken, and Prudencio could have travelled with the catheter. This would be his opinion, he said, even after the May 15, 1971 hospitalization to which reference is hereafter made.[18] His view might be different, he stated, after the January 1972 hospitalization resulting from Prudencio's stroke. At that point, he would have been more cautious in acceding to any request for permission to travel.

On May 15, 1971, Prudencio was hospitalized at Auxilio Mutuo Hospital for observation and possible castration. There was an obstruction of the uretic passage by the prostate. Although he initially refused the surgery, Prudencio finally gave permission. However, he changed his mind again, after his son Anthony had advised him of the cancer. He wanted time to think it over. Indeed, he had informed Cristobal Colon, who had visited him at the hospital that he would never agree to a castration. According to Colon, he stated that he had come into life with his testicles and he would die with them intact. A similar statement was made to Carmen Ana Unanue, Joseph's wife, when she visited him in the hospital. Indeed, he also advised her, facetiously, that he might want to have another child.

Almodovar then prescribed 30 radiotherapy treatments, which were started in the hospital and, after Prudencio's discharge on June 4, 1971, were continued at Almodovar's office until July 12, 1971. His catheter was removed during these treatments. He did fairly well for a few days without the catheter but again had to use it when a urinary tract infection developed.

On January 9, 1972 Prudencio was hospitalized at the Teacher's Hospital for a stroke, —cerebral thrombosis—,

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18 Noguera's comment about Prudencio's travelling to New Jersey before the 1972 stroke is of interest. He stated: "If [travel] . . . is not a necessity, why go." He also said that if it is a necessity "you can travel. It's uncomfortable to travel with a catheter."

which resulted in paralysis of one half of his body and inability to speak. His internist and cardiologist was again Dr. Noguera. Dr. Sanchez-Longo, a neurologist, treated him for the stroke. He was so hospitalized until February 7, 1972.

After his admission on January 9, 1972 to the hospital, Prudencio had a permanent catheter, which Almodovar would change when needed at the hospital and at Prudencio's apartment subsequent to his discharge on February 7, 1972. By the time he returned to the apartment, he was able to move and could understand what was said to him.

Hospital equipment was installed in his apartment so that on discharge he would have available that which would be required had he remained at the hospital. He had three nurses around the clock.

Almodovar visited him at his apartment on a weekly or biweekly basis, conferred with the nurses, changed the catheter and treated whatever urinary problems arose. He also considered these visits as social in nature since he had become quite friendly with Prudencio. After the 1972 stroke, Prudencio did not have his catheter out for any significant time even when he wanted it out.

From the 1972 stroke and until some short period before his death in March 1976, Prudencio's physical condition had improved but he never really fully recovered.

I find Almodovar's testimony to be truthful and to accord with other believable evidence in the case. It is entitled to substantial weight. Unlike Dr. Noguera, he had become close to Prudencio and had developed a knowledge of his patient's feelings and his reasons for wanting to return to New Jersey but without the catheter.

Prudencio discussed travel back to New Jersey with Almodovar. Carolina informed Almodovar that she was anxious to get back to her home in New Jersey.

But Prudencio refused to travel with a catheter. He wanted it removed so that he could return to his home in New Jersey, as well as attend to his business in New York. He really believed that Alymodovar would cure him sufficiently so that he would not need a catheter.

Charles contends that Prudencio never truly intended to return to New Jersey either before his stroke in January, 1972 or thereafter, since the claimed refusal to travel with the catheter was a sham. The claim is that before January, 1972, he could have travelled with the catheter. Objectively, that may be so. But the real issue resolves around his subjective feelings in this respect. He believed that it would be uncomfortable and cumbersome to have the catheter and that it would affect his appearance. He also felt that during the time he needed, or there was the highly likely need for, catheterization, —which was almost always—, he wanted to be treated and to have the catheterization handled by or under the supervision of the physician he fully trusted in Puerto Rico—Dr. Almodovar, —who, he said, had performed a miracle. Further, he was already seriously ill with prostate cancer, uremia and other urinary problems and he needed and wanted care by a physician in whom he had faith. Almodovar himself did not believe that, under all of these circumstances, Prudencio could or should travel to the New Jersey area with or without the catheter. Moreover, after his January 1972 stroke and until his death in 1976, Prudencio was obviously much sicker than before; and, though he truly intended to return to New Jersey, in fact, he could not do so because of such illness.

Dr. Almodovar, as well as Dr. Sanchez-Longo, who treated Prudencio for his stroke, wanted Prudencio to stay in Puerto Rico. Sanchez-Longo had advised Carolina, after the stroke, that Prudencio was then too ill to travel but that he might get better and eventually might be able to make the trip. Prudencio was very ill and both psysicians believed they could give him the best care. Addi-

tionally, as stated, Prudencio had a great deal of faith in Almodovar's ability and wanted him to continue to treat him. His continued stay in Puerto Rico from January 1971 onward thus constitutes a reasonable and legitimate subjective concern and response of a sick person in an endeavor to effect a cure of his illness, particularly at his advanced age.

Charles asserts that, based on the proofs, an inference should be made that between a June 25, 1971 office visit to Dr. Almodovar and the January, 1972 stroke, Almodovar had not changed Prudencio's catheter; and that he was not on catheter until February 17, 1972, when an entry in Almodovar's records after the stroke shows a change in catheters.

During the course of his testimony, at times Almodovar appeared to have a hazy recollection of the specific times that Prudencio may or may not have required the catheter. Further, on the Teacher's Hospital record of Prudencio's admission and treatment for the January 9, 1972, stroke, Almodovar stated, on January 10, 1972, that Prudencio was "on catheter drainage until four months ago"—i.e., until October 1971.

But I find his testimony with respect to the need for, and actual, catheterization basically to be not only truthful but also consistent with other proofs. Thus, for example, Dr. Noguera testified that in January, 1972, when Prudencio was admitted to the hospital he had a fever, which could have come from an infection caused by the catheter. He also stated that Prudencio had a catheter in him from his Teacher's Hospital discharge in March 1971 until he died.

According to Almodovar and other witnesses, Prudencio was off the catheter upon the completion of his radiotherapy treatment in July, 1971. Shortly after such treatment, he started to void fairly well and was uncatheterized for periods of 4 to 6 days at a time. Almodovar also

testified that Prudencio may not have been catheterized for approximately 1 or 2 months between June, 1971 and January, 1972; and that if Prudencio was off catheter for this period of time it was not because he did not need it, but, rather, by reason of treatment of a urinary infection and Almodovar's desire to see how long Prudencio could remain off catheter.

At trial, Almodovar had not recollection of Prudencio's being off catheter for the 4 month period stated in the hospital record. He recalled that during the four months preceding January 10, 1972, Prudencio was catheterized during various periods of time. He explained this apparent inconsistency by stating that although the medical records indicated that Prudencio was "on catheter drainage until four months ago," they did not say that he had been off catheter all of that time. In answer to the court's question, he stated that the 4 months was not a continuous period of non-catheterization.

Frank testified that Prudencio was off catheter for several days at a time in October or November 1971 and that he would then have been willing to return to New Jersey without the catheter, except that this was close to the time he would normally come to Puerto Rico for his winter stay. The content of that testimony is in accordance with what appears to be common sense.

Charles also relies on evidence that, before his stroke, Prudencio went to work at the Bayamon facility almost every day unless he was not feeling well. He asserts that the rigor of going to work while on catheter would be far more uncomfortable to Prudencio than that of travelling on an airplane. There is no evidence to support this assertion. Further, it completely overlooks Prudencio's reasonable reliance on the availability of Almodovar as his physician.

After consideration of all of the evidence, I have concluded that the opinions of Almodovar and Sanchez-Longo

on the travel issue are entitled to greater credence than those expressed by Noguera, particularly since they take into account their patient's reasonable fears.

The inaugural or formal opening of the new Secaucus headquarters of Goya was to have taken place in April 1975. It was adjourned to enable Prudencio to attend, in accordance with his express request to his son Joseph. Thus, in 1975 Prudencio still intended to return to his home in New Jersey. The inaugural was finally held in September 1975 when it became evident that Prudencio was too ill to be there.

From November 1970 through March 17, 1976, the substantial majority of Prudencio and Carolina's grandchildren lived in the United States and four lived in Puerto Rico. One of the reasons that Prudencio and Carolina desired to return to New Jersey was to be near most of their grandchildren, including Charles' sons, Jeffrey and Randall, who they believed had been abandoned by Charles. During visits to Puerto Rico by, and in telephone calls from, some of the grandchildren, Carolina and Prudencio informed them about their intent to return to Tenafly.[19]

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[19] Carolina never returned to the United States after Prudencio's death. However, this does not mean that they did not wish to return to New Jersey to see their grandchildren while Prudencio was alive. After Prudencio's death Carolina's entire outlook changed. She rarely went out of the Kings Court apartment, was depressed, stopped talking, and did not want to eat or sleep. Carolina's depression was not caused solely by Prudencio's death; it was also the result of her son Anthony's death soon thereafter and of Charles' refusal to see her.

Charles asserts that she could not have been so depressed for the 8 years from Prudencio's death until her own death in September, 1984. Ther is no proof to support that assertion, particularly with respect to an elderly person. Moreover, there may have been a host of additional reasons that she stayed in Puerto Rico—e.g., Ana Maria's desire to remain; there was no desire to return to Tenafly without Prudencio's being there.

Further, both Prudencio and Caraolina were dissatisfied with the relative smallness and inconvenience of the Kings Court apartment, as compared to the larger and more livable Tenafly house. They complained to others, including Almodovar and Sanchez-Longo about this.

The Kings Court apartment was in a wealthy neighborhood. Nevertheless, it was not large and was very crowded. It was on the eighth floor of an apartment building. Although it had two bathrooms, there were three relatively small bedrooms and it lacked sufficient kitchen space. Its furniture was old and not at all suitable for a residence of someone in Prudencio's financial circumstances. By contrast, the Tenafly house was spacious and had a much larger kitchen, as well as a substantial lawn and grounds, in which Carolina could garden; and it had been fully furnished by interior decorators.

Prudencio and Carolina informed others, such as Cristobal Colon and Joseph's mother-in-law, Santos, about their intent to return to their New Jersey home.

I am satisfied from the proofs that these declarations of intent to return, as well as the recitals in the various documents as to a New Jersey residence and the like, were made in good faith and without any design to mislead.

From November 1970 through 1976, when Joseph and his family checked out the Tenafly house, it had the same furnishings as before. Prudencio's band radio was still there, as were all the family pictures. In 1972 or 1973, Carolina's sister Ana Maria travelled from Puerto Rico and stayed in the Tenafly house.

When Anthony became so ill from leukemia in late 1975 that he had to be hospitalized at Columbia Presbyterian in New York City, his wife and children moved into the Tenafly house. They remained there, while it was fully furnished as before, until after Anthony's death in March 1976. When they left in late 1976 to reside in a

new home his widow had purchased in Norwood, they took all of the Tenafly house furniture to use there.

Prudencio's confinement to Puerto Rico by reason of ill health from January 1971 until his death on March 17, 1976, at 90 years of age, was involuntary, was never intended to be permanent and cannot be considered a change of domicile to Puero Rico from New Jersey. *See Cromwell v. Neeld*, 15 *N.J. Supr.* 296, 301 (App. Div. 1951); *In re Michelsohn*, 136 *N.J. Eq.* 387, 390 (Prerog Ct. 1944); *State of Texas v. Florida*, 306 *U.S.* 398 (1939). *Cf. Collins v. Yancey*, 55 *N.J. Super.* 514 (Law Div. 1959).[20] *See also*, the following cases, where the court held that no change of domicile had occurred even though the person involved spent the last years of life and died in the foreign jurisdiction: *Trust Co. of N.J. v. Spalding*, 125 *N.J.Eq.* 66 (Ch. Div. 1939); *Taormina v. Taormina Corp.*, 78 *A.2d* 473 (Del. Ch. 1951); *In re Glassford's Estate*, 249 *P.2d* 908 (Cal. Dist. Ct. App., 1952); *In re Estate of McKinley*, 337 *A.2d* 851 (Pa. 1975); *Succession of Thompson v. Harrington*, 502 *So.2d* 229 (La. Ct. App. 1987).

In *In re Michelsohn, supra*, the decedent, who died in Florida at the age of 94, was found to be a domiciliary of New Jersey, where, as here, there existed overwhelming evidence that he never abandoned his New Jersey domicile. For approximately thirty years prior to his death, it was decedent's custom to spend a portion of the year, particularly the winter months, in Florida. As his age advanced and his health failed, the periods of his stays in Florida increased until in the latter years of his life he spent more time in Florida than in New Jersey. Decedent

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[20] Prudencio was buried in Puerto Rico. This was in accordance with family practice. Thus, Carolina's father Antonio, who left Spain to live with her in Bogota in 1934, died in 1936. He was buried in nearby Hackensack, N.J. Carolina's brother Pepe, who also resided with her, in 1956 attended Joseph's wedding in Puerto Rico. He was killed there in an automobile accident and was buried in Puerto Rico.

never went to Florida except with the intention of returning to New Jersey in the spring. In fact, it was undisputed that during the last two or three years of his life, decedent went to Florida in the winter time only, upon the insistence of his physician and his son who told him that he would be unable to withstand the rigors of northern winters, and would probably not live through the winter months if he did not go.

Similarly, in *Shenton v. Abbott*, 15 *A2d* 906, 908-909 (Md. 1940), the court held that a change of residence for the purpose of benefitting one's health does not usually effect a change of domicile; that even the knowledge that one will never be able to return home on account of illness does not necessarily establish a change of domicile; and that no temporary residence, whether for the purposes of business, health or pleasure, occasions a change of domicile. In that case the issue was whether decedent died a domiciliary of Annapolis or Baltimore. The decedent was away from his domicile of origin, Annapolis, for approximately the last five years of his life due to several hospitalizations in Baltimore and elsewhere. In fact, decedent spent the last three months of his life in Florida for health reasons, and died there. He had indicated that he would remain in Florida only if he liked it. The court held that he had not changed his Annapolis domicile to Baltimore under the circumstances of the case.

A change of domicile, however, is effected if a person actually moves to a new abode intending to remain there for an indefinite time and establishing it as a place of fixed present domicile, notwithstanding that he entertains merely a possibility, or floating intention, of returning to his former domicile at some later time. *Shenton v. Abbott, supra; Gilbert v. David*, 235 *U.S.* 561 (1915).

An essential element in determining whether or not the absence for purposes of health equates with a change of domicile is the degree to which the former residence has

in fact been abandoned. *Kennan, A Treatise on Residence and Domicile,* (1934) pp. 264-265. In *Texas v. Florida, supra,* the Supreme Court held that the burden of proving a change in domicile is not sustained by a showing of periods of winter residence in obedience to the demands of health, absent evidence of other indicia of a change of domicile.

I find that Prudencio did not move in November 1970 to Puerto Rico intending to remain there indefinitely or to establish it as his domicile while entertaining a mere possibility, floating intention or vague desire of returning to New Jersey later. There are no credible proofs, or reasonable inferences therefrom, that his visit to Puerto Rico in November, 1970 was intended to be other than the usual temporary stay there. Throughout his stays in Puerto Rico, even while he was ill after November 1970, he always actually intended to return to New Jersey and reside in his New Jersey home. That intention was never abandoned, even when to others, in view of his physical condition, it appeared that it could not be fulfilled.

Charles advances essentially three theories of Puerto Rican domicile.

His first theory is that, from the very beginning, when Prudencio first came to Puerto Rico or at the very least upon his marriage to Carolina, Prudencio always considered and wanted to consider Puerto Rico as his permanent residence and the permanent place where he was domiciled or belonged. This was Prudencio's own decision. However, it also fitted in with a promise he made to Carolina and to her sister, Ana Maria, who was living with them, that they would eventually live permanently in Puerto Rico where both women would be more comfortable among people of a similar culture and language. In support of this theory, there is evidence from Charles and other witnesses, including Joseph Alvarez, that at salesmens' meetings of Goya in New York, Prudencio stated that he was basically a

Puerto Rican, that he came to the United States solely to make a living and earn his fortune and that he always intended to return to Puerto Rico to live and die. There is some dispute as to whether he was serious or merely engaging, as Charles stated, in his usual form of salesmanship in endeavoring to placate or make more comfortable his Cuban salesmen, who were upset about their inability to return to Cuba because of its government.

Hence, Charles claims that the long period of Prudencio's residence in New York and New Jersey with his family was simply for the purpose of earning the wherewithal and to build up his business here financially so that eventually he could return to his permanent home in Puerto Rico.

Charles asserts that Prudencio commenced this program of eventual return to Puerto Rico as a domiciliary without jeopardizing his business interests in a "transitional way" starting in 1949. It was then that he had his sons open the business in Puerto Rico in order to develop, in a major fashion, that part of the business. Prudencio returned permanently, according to Charles, in 1970, thereby completing his always held purpose and intent of permanently residing, and remaining for the rest of his life, in Puerto Rico. According to Charles, the length of Prudencio's stay in New York and New Jersey is without significance, since he never consciously adopted New Jersey or New York as his domicile or permanent place of residence. He argues that even though Prudencio continued to postpone his return to Puerto Rico, his intent, essentially from the very beginning, was always to be domiciled there and he never intended to be permanently a resident of New Jersey or New York.

Charles' second theory of Puerto Rican domicile is predicated on his assertion that the indicia of New Jersey domicile are part of a fictional New Jersey domicile strategy that was suggested to Prudencio by his attorney, Mr. Siegel,

for the purpose of defeating any claim to his assets or estate by his alleged illegitimate son, Augusto Falero, as a forced heir under Puerto Rican law. The claim is that this fictional domicile plan commenced no earlier than January, 1966 and that sometime during that year, Prudencio was given instructions by Siegel as to how to maintain minimal contacts in New Jersey to demonstrate that his domicile was in New Jersey and not Puerto Rico even though, in fact, his real domicile was in Puerto Rico. This strategy, according to Charles, was continued by Prudencio and perhaps Charles' brothers, Joseph, Anthony and Frank, in or about 1969 or 1970, to include not only Falero but also Charles, in order to defeat Charles' forced heirship rights against Prudencio's assets or estate.

Charles' third theory of Puerto Rican domicile is that Prudencio, before November 1970, deliberately wound up his affairs by, among other things, executing the Trust and the Will, and returned to Puerto Rico with Carolina and Carolina's sister, for the purpose of staying there permanently. His intent to do so was already formed at the time the Trust and Will were executed in November 1970. He decided to make this permanent move while he was about 84 years of age and after he learned that he was very seriously ill either with prostate cancer or otherwise.[21] Accordingly, even if New Jersey were his domicile before November 1970, his intent to return to, and his return to, Puerto Rico, effected a change of domicile, so that from and after November 1970, and at the time the Trust and Will were executed in November, 1970, and until his death in March 1976, his domicile was in Puerto Rico, not New Jersey.

There is no credible evidence, nor are there reasonable inferences from any of the evidence, to support Charles'

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[21] Charles shifted his position during trial as to whether Prudencio's claimed knowledge of prostate cancer was a motivating factor in this respect.

first theory of Prudencio's domicile as being in Puerto Rico.

Indeed, the proofs clearly show that Prudencio never intended to make Puerto Rico his permanent home, and that, once he left to go to the United States, he considered his place of residence there as his home. His stays in Puerto Rico thereafter—commencing some 26 or 27 years after he and Carolina and his family resided continuously in New York and New Jersey—were temporary in nature and were combined health, vacation, and business sojourns. There is some evidence that he stated, on occasion, that he had come to the United States to earn a living and make his fortune but that he would return to Puerto Rico eventually to live and die there. But these statements were made at salesmen's meetings for the purpose of assuaging the concerns of Cuban salesmen of Goya who were upset at having been compelled to leave Cuba. He was engaging, as Charles indicated, in his usual salesmanship and propaganda at these times. He was not at all serious.

The testimony of Roberto Perez, a long-time employee of Goya, stationed in Chicago, and a good friend of Prudencio, is revealing in this respect. He was an anti-Castro Cuban, who wanted Prudencio to move his job from Chicago to the warmer climate of Puerto Rico. Prudencio refused, saying that neither of them was going to reside in Puerto Rico, that they would both have to live with the cold and that both of them would live and die in the United States. He told Perez to forget about Cuba. Prudencio also stated that Perez would learn to love the United States, just as he did, since it was there that he lived with his family and earned a living. Prudencio informed him, however, that he went in the winters to Puerto Rico since the warm weather made his arthritis feel better. He said that he also came to Puerto Rico to find gandules and to attend to the operations of the businesses there. In the winter of 1967, when Perez went to

see Prudencio and Charles in Puerto Rico to discuss business, Perez asked Prudencio why he did not live in pretty Perto Rico all of the time and again requested a transfer there. Prudencio reiterated that his place and that of Perez was in the United States.

I find no substance to Charles' claim that these one-to-one conversations between Prudencio and his good friend Perez were simply examples of Prudencio's endeavor as a salesman to keep a valued employee in Chicago.

The Perez testimony is completely credible. He was an unshakable witness. The reference to their both having to live in a cold climate may have been an exaggeration, but Perez had also been informed by Prudencio and thus knew, that Prudencio spent the winter months in Puerto Rico because the warm weather was helpful for his arthritis.

Charles' testimony that Prudencio had promised Carolina and Ana Maria that he would return to Puerto Rico permanently so that they would feel more at home is without any corroborative support.

For example, one of Charles' witnesses, George Perez, a former Goya employee, testified that, while driving Prudencio a few times from Goya to Tenafly, Prudencio said that Carolina did not like the Tenafly house. But Perez also said that Prudencio stated that the winter weather in New Jersey did not agree with him.

In any event, even if he had made these promises to Carolina and Ana Maria, the evidence clearly shows that Prudencio was an independent, strong-willed person who would not fulfill any such promise unless it suited him personally, either for business or other reasons. As indicated elsewhere in this opinion, there are no credible proofs that his visit to Puerto Rico in November, 1970 was intended to be other than the usual temporary stay there.

Additionally, there is no believable factual support for Charles' assertion that: (1) the long period of Prudencio's residence in New York and New Jersey with his family was simply for the purpose of earning the wherewithal and to build up his business here financially so that eventually he could return to his permanent home in Puerto Rico; (2) Prudencio commenced his program of eventual return to Puerto Rico as a domiciliary without jeopardizing his business interests in a "transitional way" starting in 1949, when he had his sons open the business in Puerto Rico in order to develop, in a major fashion, that part of the business; (3) Prudencio returned to Puerto Rico permanently, in 1970, thereby completing his always-held purpose and intent of residing and remaining there for the rest of his life; and (4) despite the length of Prudencio's stay in New York and New Jersey, he never consicously adopted New Jersey or New York as his domicile or permanent place of residence, but merely continued to postpone his return to Puerto Rico.

Charles points to a number of factors that he claims show such Puero Rican roots for Prudencio as to warrant a finding of Puerto Rican domicile even throughout his extended stay in the United States and more particularly New Jersey.

Thus, he states that Carolina had a substantial family in Puerto Rico. Her maternal grandfather had a spacious home there and had been a tax collector. He had purchased a 314-acre farm, Finca Carolina. Although Carolina and her siblings, by 1923, owned through inheritance a 3.87% interest in the farm, by 1975 they had a 61% interest therein. In or about 1928, Prudencio had purchased a 4.3% interest in the farm. Prudencio had no relatives residing in the New York-New Jersey area. During the 1930's Prudencio and Carolina had relatives in Puerto Rico; but most of the relatives were those of Carolina. Prudencio did not have many close personal friends in the United States; in the 1970's he had several friends

visiting him in Puerto Rico. There is a small business award given by the Puerto Rico Chamber of Commerce named after Prudencio; no similar award is given by the Spain/U.S. Chamber of Commerce in New York.

Charles asserts that Spanish was the language usually spoken in Prudencio's residences in Puerto Rico, New York City, Ridgefield Park, Bogota and Tenafly. Even when Prudencio was residing in New York City or New Jersey, he gravitated towards and was attracted by the Hispanc lifestyle. For example, he read Spanish language newspapers and he enjoyed talking about life in Puerto Rico and Spain with the Hispanic Spanish speaking salesmen of Goya Foods.

Charles further states that it is a Hispanic custom for the family of a deceased to publish a death notice in honor of the deceased in the newspapers. Joseph and Frank retained a public relations firm for this and other purposes in connection with Prudencio's death. Death notices honoring Prudencio from the Unanue family and from "the directors and employees of Goya Enterprises" were published, in Puerto Rico, in a Spanish language newspaper and in an English language newspaper. The death notices published in the English language newspaper were in Spanish. No death notices were published in any papers, English or Spanish, in New York City or New Jersey.[22]

Conceivably much or all of the foregoing may be said to show that Prudencia always intended that Puerto Rico be his permanent home. But, even if they are undisputed facts, as Charles contends, I do not find that they are so significant as in any wise to undermine the other substantial evidence relating to Prudencio's long physical abode

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[22] Charles also relies on a Goya advertising brochure, published after Prudencio's death, stating that "it all started at the Bayamon facility, where we have expanded from the Caribbean, our birthplace." This appears to be merely business advertising exaggeration, in light of the proofs in this case.

in New Jersey and his intention throughout that New Jersey be his permanent home.

In any event, I find that death notices or obituaries did appear in the New York and New Jersey papers, despite Joseph's somewhat equivocal testimony on that matter. Further, a memorial service for Prudencio was held at the Bogota church about three weeks after the funeral, after an announcement in the Spanish media in New York and New Jersey. It was well attended.

Hence, I find and conclude that there is no merit to, or factual basis for, Charles' first theory of domicile—i.e. that Prudencio's intent, essentially from the very beginning, was always to be domiciled in Puerto Rico and he never intended to be permanently a resident of New Jersey or New York, notwithstanding the relatively short periods of residence in Puerto Rico and long periods in New York-New Jersey. There are just no facts or sufficient proofs here to support the proposition relied on by Charles in asserting this theory of domicile, as set forth in the following quotation from *Lyon v. Glaser,* 60 *N.J.* 259, 264 (1972):

> A very short period of residence in a given place may be sufficient to show domicil, but mere residence, regardless of its length, is not sufficient. It has been said that concurrence, even for a moment, of physical presence at a dwelling place with the intention of making it a permanent abode, effects a change of domicil.

See also, O'Hara v. Glaser, 60 *N.J.* 239, 248-249 (1972).

There is also no credible evidence or reasonable inferences from any of the evidence, to support Charles' second or fictional New Jersey domicile thesis.

I have found as a fact that Prudencio truly believed the following: that he did have an illegitimate son in Puerto Rico before he married Carolina; that the son was

Augusto Falero; and that the child's mother was Ramona Falero. I am not making any finding as to actual paternity.

But Charles, whose evidence supports this finding, would use it as the predicate of a plan or conspiracy by Prudencio, on the advice of his attorney, Samuel Siegel, to establish the indicia of a fictional domicile in New Jersey so as to deprive Falero of his forced heirship rights under the law of Puerto Rico.

This thesis is not supported by the proofs, even though it is not without its element of inventiveness.

Among other things, Charles relies on an alleged June 18, 1966 meeting, to which he alone testified, at which Prudencio and all of his sons were present. At that meeting, he stated, Falero's illegitimacy as a son of Prudencio was discussed and Samuel Siegel gave Prudencio specific instructions as to how to maintain a fictional domicile in New Jersey to defeat Falero's heirship rights: for example, maintaining a residence and bank accounts in New Jersey; placing New Jersey as his residence on all documents; and doing nothing while in Puerto Rico to create any record or other evidence of such activity as might result in a determination that he was, in fact, a Puerto Rican domiciliary during his lifetime or at his death.

I am satisfied that no meeting at which a fictional domicile for Prudencio was discussed ever took place on June 18, 1966 or at any other time. I have concluded that Charles' testimony as to what occurred at the alleged June 18, 1966 meeting constitutes an adaptation of the information given to *him* by Siegel at a meeting as to what Charles had to do in order to establish *his* Puerto Rican domicile. It further appears to constitute either a deliberate, or, to give Charles the benefit of the doubt, a confused, importing of that kind of information into what he claims Siegel said at that meeting with respect to *Prudencio's* maintaining a New Jersey domicile. There was

just no fictional New Jersey domicile plan that Prudencio had or that any of his attorneys advised him to adopt.

I note that Charles' evidence relating to the June 1966 meeting and what occurred there is replete with conflicts, internal inconsistencies and contradictions and shifts in testimonial data and content presented.[23]

Charles also relies, in support of his fictional domicile theory, on letters sent in 1972 by Frank, Carolina and Prudencio.

On June 9, 1972, an agreement of settlement relating to Charles' claim in the then pending litigation, was entered into. Under that agreement, since Prudencio's signature was required with respect to three documents related to the agreement (a proxy, power of attorney and delegation of authority), Charles' brothers agreed to use their best efforts to obtain a certificate from a physician showing that Prudencio was competent to sign such a document. Later, on July 3, 1972, Frank sent a letter to Skadden Arps [24] covering two matters:

> 1) It stated that Dr. Almodovar confirmed to Frank that he would write a letter stating that Prudencio was of sound mind.
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> 2) It further stated that Prudencio had instructed Carolina to write a letter to Joseph urging him to fix the roof on the Tenafly house "so he can go back to

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23 I further note that it is at least reasonably possible, based on all of the credible evidence, that Joseph, Frank and Charles had been told at one time or another by Prudencio that he believed Falero was his son. The credibiilty of the testimony of Joseph and Frank, to the extent that it is to the contrary, is suspect.

24 Skadden Arps were the attorneys then essentially representing the business entities (among them, Goya and the Puerto Rican companies) and Charles' brothers, as well as Prudencio, in the settlement of the 1972 litigation.

New Jersey in the not too distant future, if his health continues to progress as it is now."

On June 22, 1972, Carolina did, in fact, in her own handwriting, write a letter to Joseph containing various bits of family information, indicating a desire to return to Tenafly and take care of Prudencio there, and requesting that he fix the roof in the Tenafly house, using her money on deposit in one of the companies' banks for that purpose. On September 30, 1972, Prudencio sent a typewritten letter, on Puerto Rico Food Products stationery, to Joseph in which he asked that a new roof be installed on the Tenafly house. He also stated that he felt he was recovering and expected to return to New Jersey as soon as he was able to travel again. The letter was signed by him in a firm fashion.[25]

Plaintiffs claim that these were genuine indicia of Prudencio's desire to return to New Jersey, thus showing that New Jersey was his domicile. Alternatively, they claim that Frank, in his letter confirming that Dr. Almodovar would issue a competency letter as to Prudencio, was merely advising Skadden Arps that Prudencio's instruction to Carolina to send the letter as to the roof demonstrated his then competency and that he was in a good enough state to want to come home to New Jersey. Joseph testified that he kept Prudencio's letter, on advice of counsel, as further evidence, if Charles should question it, of Prudencio's competency relating to the 1972 settlement agreement.

Charles, on the other hand, contends that these letters simply constitute the following of instructions given by Siegel years before to make sure that there was written evidence that Prudencio intended to return to New Jersey

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[25] The letter apparently was the result of Prudencio's then ability to communicate his thoughts to the person who actually prepared it. He had his "ups and downs" in this respect since the January 1972 stroke.

from Puerto Rico and that they were part of the fictional domicile plan devised by Siegel. He asserts that the substance of the letters sent by Prudencio and Carolina could have been conveyed over the telephone or orally.

I find from the credible evidence that those letters show the following:

(1) Prudencio was competent as set forth in Dr. Almodovar's Certification of August 8, 1972, a date between Carolina's letter of June 22, 1972 and Prudencio's letter of September 30, 1972. They were sent in connection with Dr. Almodovar's letter as to competency required by the 1972 agreement and required by Charles or his attorney with respect to that agreement.

(2) Prudencio and Carolina then still truly hoped and intended to return to their home in Tenafly, New Jersey, in the near future when he was able, physically and emotionally, to do so. He was then recovering from the effects of the January 1972 stroke. Prudencio was relying on his faith in Almodovar's getting him sufficiently well to travel without the catheter. Carolina also was relying on Almodovar's expertise in this respect, as well as the hope extended by both Almodovar and Sanchez-Longo after the stroke that they could eventually travel to and stay in Tenafly. Carolina was very optimistic about Prudencio's getting sufficiently well so that they could return to Tenafly. His condition after the stroke kept changing and, for periods in 1972 and thereafter, he was getting better, both physically and emotionally.

In Dr. Sanchez-Longo's first conversation with Carolina after Prudencio's discharge on February 7, 1972 from the Teacher's Hospital stay occasioned by his stroke, Carolina questioned him about the possibility of Prudencio's returning to New Jersey. He told Carolina that it was too soon after Prudencio's release from the hospital for him to travel but that from a neurological standpoint Prudencio would eventually be able to return to New Jersey.

The heightened expectations of the possibility of returning to New Jersey that Dr. Sanchez-Longo's prognosis would have created were not diminished in any way by either Dr. Almodovar or Dr. Noguera. While in retrospect it may be easy to label the expectations of Prudencio and Carolina as unrealistic, I am satisfied that in 1972 their hopes were reasonable and well founded.

Dr. Almodovar recalled Prudencio's discussing his desire to return to his home in New Jersey. While on cross-examination Almodovar wavered and indicated he could not recall who asked him if Prudencio could travel in 1972, a review of that testimony reveals that, at the very least, he never told Prudencio or Carolina that Prudencio would not be able to travel to New Jersey.[26] In fact, Almodovar stated that from January 1972 until some years thereafter, Prudencio could have gone to New Jersey from a urological standpoint if he were willing to travel with a catheter.

Additionally, a review of Dr. Noguera's testimony reveals that he also never told Prudencio that he would be unable to travel to New Jersey. Dr. Noguera testified that within two weeks of Prudencio's discharge on February 7, 1972 from Teachers Hospital after the stroke, he would have allowed Prudencio to travel to the United States if he were accompanied by a nurse and a member of the family.

There is also evidence, by way of pictures and testimony, that Prudencio was obviously enjoying his April 1972 birthday party, where he was eating with both hands. Further, the Tenafly house was being looked after during this period by Joseph, his wife and members of their family so that it would be in good shape for their return.

Based upon the testimony of the doctors, together with the fact that Prudencio's condition improved at times

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[26] I have found, however, elsewhere in this opinion, that his testimony, including that on direct, is believable and entitled to credit.

throughout 1972, I conclude that the essential purpose of the letters was to have the Tenafly house repaired in reasonable expectation of the return of Prudencio and Carolina to New Jersey. The letters conveyed the realistic hope of Prudencio and Carolina that Prudencio would soon be well enough to travel. The fact that these hopes never became a reality does not make them any less genuine or make them less evidential of a firm intent to return to New Jersey.

It is not patently unreasonable, however, to view the three letters with respect to the Tenafly roof repair instructions as relating to the matter of Prudencio's domicile. All three letters, taken together, can be said to be designed to show, in part, that there should be no misunderstanding as to Prudencio's intention to continue to maintain his actual New Jersey domicile while he was ill in Puerto Rico. But I find that they were not part of a plan to establish a domicile or fictional domicile in New Jersey. Rather, at best, they were meant to evidence, in writing, Prudencio's desire and intent to continue New Jersey as his actual domicile, in light of his longer-than-expected stay in Puerto Rico in 1972 by reason of his illness, in the event this already-established domicile were attacked by anyone, including Falero, or, even at that point, Charles (who had been ousted from his positions with the companies and sold his interests therein). They do not negate a genuine and permanent domicile of Prudencio then or thereafter in Tenafly, New Jersey.

Although there is no evidence to support this scenario, it is not at all inconceivable that Prudencio, based on his belief that Falero was his son, in 1972 or before that date, consulted an attorney for advice as to how to avoid any problems with respect to Falero's being able, under Puerto Rico law, to participate in obtaining a share of his assets at Prudencio's death. The attorney advised him that it was important for this purpose that he do nothing

while in Puerto Rico that might jeopardize his New Jersey domicile and result in a determination that he was, in fact, a Puerto Rican domiciliary during his lifetime or at his death.

But the existence of this advice does not militate against a finding that his actual domicile throughout was always in New Jersey during the relevant times here involved. If such advice were given, it was given and followed out of an abundance of caution, to make sure that no potential problem could arise in the event his New Jersey domicile was ever questioned. The purpose was to preclude any attack on his family formed intention and clear desire to be a permanent resident and domiciliary of New Jersey and to maintain his physical presence here throughout the years in which he was able, in his own mind, to stay in, or travel to or from, New Jersey.

The plaintiffs—the trustees, executors and beneficiaries, —by a preponderance of the believable evidence, have established such intent and presence and, thus, a genuine domicile in New Jersey. Additionally, such domicile has been established as of November 16, 1970 when the *inter vivos* trust was created and as of March 17, 1976, when Prudencio died. It is not at all fictional.

Charles also cites as evidence of a fictional domicile provisions in Prudencio's wills prior to November 1970.

There is a peculiar aspect to Prudencio's wills executed through October 9, 1969 and to Carolina's will executed on October 24, 1964. In Prudencio's October 24, 1964, March 24, 1969, and October 9, 1969 wills, and in Carolina's will, even though the residence is stated as New Jersey, there is a provision that the law of New York should apply to its validity and effect and the construction of its dispositions and provisions; that the will be probated and administered in New York; and that none of the assets of the estate which may be found in New York shall be remitted to any other jurisdiction for distribution.

It is not until a will of October 23, 1970, and the will of November 16, 1970 (involved in this case), that this provision as to New York and the non-remission of assets to another jurisdiction is omitted. In those two wills, Prudencio is stated to be a citizen of the United States and a resident of Tenafly, Bergen County, New Jersey; and instead of referring to the law of a particular state, reference is made in the October 1970 will to excusing the trustees from accounting, whether or not required by "the laws of the State of my domicile, and in both wills, to necessary or desirable ancillary or separate administration of part of the estate, "in a domestic or foreign jurisdiction other than the State of my domicile at death." Additionally, in the November 16, 1970 will, there is a paragraph devising all the residue of the estate to the trustees under the trust executed the same day (and involved in this case) and stating that the devise shall be added to the trust estate, to be held, administered and distributed in accordance with the trust provisions. Thus, this will and the trust must be read together. The trust provides generally that it shall be construed under, and the trusts and shares thereunder shall be governed in all respects by, New Jersey law.

All but the 1970 wills were prepared by Samuel Siegel, Prudencio's attorney.

Charles contends that the provisions in the early wills commencing with that of October 24, 1964 through October 9, 1969 directing New York probate and administration and that none of the estate assets be remitted to any jurisdiction other than New York constitute evidence of the plan and conspiracy by Siegel and Prudencio to establish a fictional domicile for Prudencio in New Jersey. Charles asks: "What possible purpose could this highly unusual and, perhaps unenforceable, provision have other than to attempt to ensure that the shares of Goya Foods registered in Prudencio's name be physically kept within the jurisdiction of the State of New York and not be

forwarded to the jurisdiction of his domicile on the date of his death for distribution in accordance with the laws of that jurisdiction with respect to personality"?

There is no explanation in the proofs for these unusual provisions in the wills. The reason for them are a matter only of speculation. One may surmise, for example, that as a New York attorney, Siegel wanted to be able to represent the estate by having probate in, and the assets confined to, New York; or, as plaintiffs contend, that this is consistent with usual choice-of-law provisions found in form books and also found in Charles' will.[27]

But I do not find that it is even in the realm of speculation that these provisions evince or support a plan to establish a fictional New Jersey domicile. I have already concluded that there is no credible proof as to any such plan or conspiracy. I note that at trial Charles expressly stipulated that the claimed conspiracy did not commence before January 1966. The first will provision relied on as proof of the plan is dated prior thereto, October 1964. Further, these will provisions do not appear in the November 16, 1970 will. Additionally, that will, by incorporating the trust provisions of the same date, makes it clear that the will provisions shall also be governed, as is the trust, by New Jersey law. That kind of language here—expressly referring to New Jersey law as governing the trust and the will,—is evidence which supports a finding of a New Jersey domicile.

To the extent that the 1972 letters, if at all, can be said to relate to domicile, I have already concluded that they must be viewed only as an endeavor to prevent an attack on an established New Jersey domicile and not to evidence a fictional New Jersey domicile,—i.e., one that in fact did not then exist. The same may be said as to the

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[27] As a general rule, the administration or construction of a testamentary trust is governed by the law of the testator's domicile, except where the will provides that the law of some other jurisdiction shall control. *In re Pfizer, supra*, 33 *N.J. Super.* at 258-259.

will provisions. Even if these documents are viewed as a self-declaration of non-Puerto Rican domicile for the motive indicated, there are more than sufficient evidential objective indicia of New Jersey domicile to establish that that was in fact his true, fixed permanent home—i.e., his domicile—until the date of his death on March 17, 1976. Under these circumstances a motive to avoid forced heirship rights by maintaining such a domicile will not change the result. *Trustees of Princeton University v. Trust Co. of N.J., supra,* 22 *N.J.* at 596; *Lyon v. Glaser, supra,* 60 *N.J.* at 264; *Cf. Succession of Barnes, supra.*

Charles' third theory of domicile has already been determined to be without merit. That theory is that before November 1970, Prudencio, then 84 years old and knowing he was ill, deliberately wound up his affairs, which included the execution of the Trust and the Will, and returned to Puerto Rico with Carolina and her sister, Ana Maria, in order to stay there permanently. I have found that the proofs do not support any such intent or conduct by Prudencio and that the November 1970 trip to Puerto Rico was made with the usual intent to return to Tenafly after the winter months.

Charles claims that there is a factual basis for a finding that Prudencio, by the time he executed the Will and the Trust in November 1970, had already wound up his affairs in New Jersey-New York and Spain in order to settle permanently in Puerto Rico. He relies, among other things, on various bits of data involving a Spanish bank account that he asserts Prudencio had opened in Spain sometime during October-December 4, 1970 (the first deposit in the account in the joint names of Prudencio and Joseph was on December 4, 1970); changes in Prudencio's last will and testament of November 16, 1970 affecting the bequest to his brothers and sisters in Spain; the change on November 16, 1970 from a testamentary trust (in an October 23, 1970 will) to an *inter vivos* trust, which, according to Charles, was intended to insulate the Goya shares of stock

(owned by Prudencio) from the estate and the claims of Falero and Charles, despite Prudencio's actual domicile in Puerto Rico; and other evidence which Charles asserts leads to an inference that Prudencio was in Spain from October-December 1970 and that he had decided, for health reasons, prior thereto to reside in Puerto Rico permanently.

But the inferences required for such a finding, in my view, are not reasonable and would require a truly speculative leap from the evidence adduced.

Apparently at some point Charles was prepared to submit proof from Spanish relatives that Prudencio visited them in Spain in or about October or November 1970. But the evidence was not presented. The implication at trial, never supported by any proof, was that they had been dissuaded from testifying by one or more of the plaintiffs. Whether such testimony, if presented, might have tipped the scales in Charles' favor on this factual issue is obviously unknown. That Charles feared that an undisclosed affidavit by one of the witnesses, obtained by plaintiffs, would affect the credibility of his Spanish witness is no reason for not using that witness at trial. In any event, I have found that the credible proofs before me demonstrate that Prudencio went to Puerto Rico in November 1970 with the intention of returning home to Tenafly. Charles has not shown otherwise.

Charles requests the court to make many inferences adverse to plaintiffs in this respect, as well in others. He claims that such inferences are warranted by reason of plaintiffs' failure to offer available proofs that would refute the contentions he has made on the basis of the evidence he has presented.

Thus, he cites the following as evidential of Prudencio's visit to Spain in October-November, 1970: (1) The open-

ing of a Spanish bank account in the joint names of Prudencio and Joseph, in which the first deposit was made on December 4, 1970;[28] (2) An extrapolation from a comparison of Prudencio's records of his various Mimaya Hospital hospitalizations, which would show that for the first time, in his December 3-5, 1970 record, he apparently stated that he was seen by Dr. Pena in Spain for dyspepsia and constipation[29]; (3) A comparison or interpretation of Prudencio's October 23, 1970 will and his November 16, 1970 will with respect to bequests to his brother and sisters in Spain, which it is claimed show that Prudencio went to Spain between October 23 and November 16, 1970 and withdrew funds in his Spanish bank accounts. The October will bequeathed $15,000 which specifically could be satisfied with Spanish bank account funds. The November will, as prepared, did not provide for a $15,000 bequest; instead, it provided a bequest of "any cash sum on deposit at" his death in his Spanish bank accounts. Before the will was executed, however, this typewritten clause was stricken in writing and replaced with a handwritten bequest of simply $15,000. Skadden Arps prepared the wills and Maurise Roche, a Skadden Arps partner, witnessed the November will.

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[28] Charles appears to claim that Prudencio had a Spanish bank account even before the one opened or about December 4, 1970. But the search for Spanish bank accounts in Prudencio's name or in which he had an interest, although made with the assistance of the court during trial, did not result in providing sufficient information in this respect. However, Joseph testified that there was such a Spanish bank account between September 1966 and November 1970. It should be noted that on December 4, 1970 Prudencio was in Mimaya Hospital in Puerto Rico.

[29] The argument is that the Mimaya Hospital records demonstrate that, between his discharge from Mimaya on April 28, 1969 and his admission there on December 3, 1970, he was in Spain. It may not be a specious contention but it does not suffice in any wise to overcome the proofs which support Prudencio's intention to return to Tenafly after the November 1970 trip to Puerto Rico.

Additionally, Charles contends at least one other issue —not directly related to Prudencio's alleged windup of affairs to return to Puerto Rico was not responsively addressed by plaintiffs' proofs.

Charles testified that the dispute (which eventually led to his discharge) between him, on the one hand, and his brothers and father, on the other, in 1968 and 1969 centered, in part, around his discovery that Joseph had made false entries in Goya's ledgers known as the "advance payment books." Charles asserts that as a result of these false entries Goya did not bill Caribbean Canneries for payments it made on behalf of Caribbean to tomato paste suppliers in Portugal, which shipped the paste directly to Caribbean; and that this reduced Goya's profits and Federal income taxes, while increasing the tax exempt profits of Caribbean. Charles also testified that on May 26, 1969, he took possession of the two advance payment books for the years 1967 to 1969 from Conrad Colon, who was employed by Goya Foods at that time and was the custodian of the ledgers. Charles' receipt bearing that date reads as follows: "Received from Colon two (2) advance payment books 1967/1969 s/Charles Unanue."

By letter dated July 10, 1969, a copy of this receipt was mailed to David Orlan, Esq. of Casey, Lane & Mittendorf, who had been Charles' attorney prior to the date of that letter, by Barry H. Garfinkel, Esq. of Skadden Arps, attorneys for Goya Foods. The letter stated:

> On or about May 26, 1969, your client, Mr. Charles Unanue, requisitioned and then removed from the corporate premises two Advance Payment Books belonging to Goya Foods, Inc. A copy of the receipt therefor is annexed hereto. As your client is no longer an officer or director of Goya Foods, Inc., we, on behalf of our client, Goya Foods, Inc., demand that these two Advance Payment Books be immediately returned to that Company.

Charles asserts that the letter and receipt clearly indicate the existence of two ledgers known to Charles, Conrad Colon, Garfinkel and his client, Goya Foods, as the "Advance Payment Books." Charles testified that he had given the books to his attorney but that his attorney returned them as requested to Garfinkel without his knowledge and pursuant to some collusive arrangement between his attorney and Skadden Arps. They were never returned, nor were copies retained by his attorney. Joseph and Frank testified that the advance payment books never existed. Charles states that the two persons who could shed light on the existence of the books, or the fiction of their existence, and the circumstances surrounding Garfinkel's letter, would have been Conrad Colon and Garfinkel. If they had testified, it is said, the credibility of the tetsimony of Joseph and Frank in this respect could have been explored more fully.

Charles also asserts that plaintiffs failed to present evidence to rebut this contention that the *inter vivos* trust, a departure from prior testamentary trusts, was intended to insulate the Goya shares from claims of Falero and Charles had they remained in the estate, even though Prudencio was domiciled in Puerto Rico. But plaintiffs have offered a rational explanation: the purpose was to remove Prudencio's shares from the provisions of a June 20, 1967 shareholder's agreement, which, at his death, would have to be sold for their nominal book value.

Throughout the trial, Conrad Colon worked for Goya at its Secaucus facility and Garfinkel appeared in the courtroom as plaintiffs' nontrial counsel. Neither was called by plaintiffs.

But there is no obligation on plaintiffs to offer evidence simply because Charles raises possible inferences from proofs he presented, which may indeed be ambiguous or conjectural in nature. Such proofs do not require plaintiffs to present evidence to fill in the gaps or suffer adverse

inferences if they do not do so. *McCormick on Evidence,* (3d Ed.) sec. 272, at 804-808 (pointing out, in part, that the availability of modern discovery procedures serves to diminish both the justification and the need for the adverse inference). *See also, Long v. Landy,* 35 *N.J.* 44, 54 (1961).

Here, at the very least, Charles should have endeavored to subpoena and call the claimed absent witnesses, considered by him to be significant or essential to bolster his version of the events involved and to fill in what he perceived to be important gaps in plaintiffs' response to his case.

Conrad Colon could have been subpoenaed, since he works at Goya's Secaucus office. Garfinkel, who was in court, also could have been subpoenaed. An attempt should have been made to compel the appearance and testimony of Roche or any other Skadden Arps' attorney involved in the preparation of the November 1970 will and trust to shed light on the reasons, if any, Prudencio gave for the handwritten change in that will or the use of the *inter vivos* trust. The attorney-client privilige might have been invoked by the attorneys. But the availability of that privilege is truly questionable. Garfinkel would be testifying with respect to a matter disclosed in his own letter to Charles' attorney, including whether the advance payment books were returned, and the other attorney (assuming Garfinkel was not aware of the reason for the will change or the trust) would have been compelled to disclose what Prudencio said at the time the will was changed or the trust was executed. In any event, a ruling of the court could have been sought with respect to the assertion of any such privilege either by the attorney or the client. And, of course, Charles would not be bound by the testimony of any such witnesses. Their testimony, just as that of any other witness, would be suject to the court's assessment of credibility. *See Becker v. Eisenstodt,* 60 *N.J. Super.* 240, 248-249 (App. Div. 1960);

Lerman v. Lerman, 245 *N.J. Super.* 312, 316-318 (Ch. Div. 1990); *In re Subpoena Duces Tecum Inst. Management Corp.*, 137 *N.J. Super.* 208, 213 (App. Div. 1975); *Marxe v. Marxe*, 233 *N.J. Super.* 247, 251 (Ch. Div. 1989); *Evid. Rule* 26 (2)(b); *Ervesun v. Bank of New York*, 99 *N.J. Super.* 162, 171-172 (App. Div. 1968), *certif. den.* 51 *N.J.* 394 (1968)); *Balazinski v. Lebid*, 65 *N.J. Super.* 483, 494 (App. Div. 1961). *See also, Matter of Estate of Rogers*, 245 *N.J. Super.* 39, 44 (App. Div. 1990) (a court possesses the inherent power to require a nonparty to give evidence).

During trial Charles' attorney demonstrated that he was a skilled examiner of witnesses. He was also most effective in obtaining favorable evidential and other rulings by the court. Had Charles tried to fill the gaps he claims exist by the calling of these witnesses, it may well be that he would not have had to rely on adverse inferences from the failure of plaintiffs to present such testimony.

Under all of these circumstances, I will not make the requested adverse inferences. *See State v. Clawans*, 38 *N.J.* 162, 170-175 (1962); *Wild* v. *Roman*, 91 *N.J.* Super. 410 (App. Div. 1966); *State in Interest of J.L.W.*, 236 *N.J. Super.* 336, 345-346 (App. Div. 1989).

In support of the position that Prudencio intended to retire to Puerto Rico permanently in November 1970, Charles relies on the contents of Prudencio's death certificates, as well as other evidence allegedly confirming such retirement. Such evidence is also claimed to be supportive of at least a permanent retirement in Puerto Rico in January 1972 when Prudencio had his stroke.

Dr. Noguera signed the death certificates and Frank Unanus signed as the "informant" thereon.

I am satisfied that the source of the information in the March 1976 death certificates was Frank, despite his testimony to the contrary. All of the certificates list him as

the "informant" and he signed them as the "informant." But there are sufficient problems with the data appearing thereon that he allegedly submitted to warrant the conclusion, which I make, that the contents of these certificates are entitled to little, if any, weight on the issue of Prudencio's domicile. Something obviously was changed when the data was inserted in the blank spaces on the certificates by typewriter after Frank signed the certificates as informant. Either Frank hurriedly gave the information without thought or the person to whom it was given was in error in completing the certificates.

The circumstances surrounding the death of a member of a family, as well as the reliability and care of those who actually insert the information given by the family informant, make the information in the death certificates here of no significant evidentiary force as to the truth and accuracy thereof on the issue of domicile. *See Lyon v.* Glaser, *supra*, 60 *N.J.* at 268-269. *See also, Bainhauer v. Manoukian,* 215 *N.J. Super.* 9, 44 (App. Div. 1987).

It should be noted that Dr. Noguera, who signed the death certificate, testified that, after he signed, the funeral home typed in the information other than his diagnosis as to cause of death, Prudencio's name and date of death. He only put in the minimal amount of information required to get Prudencio buried. He acknowledged that he made an error when, after inserting the date of death in the certificate as March 17, 1976, immediately before his signature he wrote March 17, 1970.

Additionally, for some inexplicable reason there are two death certificates from the funeral home, which have some differences from each other. The official certificate filed with the Puerto Rican government also contains information that is different from or additional to that in the funeral home documents. Furthermore, that certicate itself seems to be completed by two separate typewriters with different type, including such matters as Prudencio's age at death.

This official certificate states that Prudencio's time of residence in Puerto Rico was 76 years and that his habitual residence was in San Juan. It also states that he last worked in 1972.

This information, according to Charles, together with other data, supports his claim that, not only did Prudencio permanently retire to Puerto Rico in November 1970 but also that, in any event, he actually so retired in January 1972, when he had the stroke at age 85, or prior thereto. Charles quotes from a 1980 magazine article in which Frank stated that Prudencio worked until he was 85 and the 1972 Teacher's Hospital record relating to his hospialization for the stroke, which states, under "occupation" that he was then retired.

But none of the foregoing proofs suffices to overcome the substantial credible evidence that supports the finding, which I have made, that Prudencio's domicile was in New Jersey not only prior to and in 1970 but also until his death on March 17, 1976.

Attacks are made by Charles on the credibility of Frank and Robert Unanue, Anthony's son. Robert was an executor of Anthony's estate and a trustee of trusts under his will. They both testified as to lack of knowledge of any stock ownership interest of Anthony or anyone else in Goya en Espana, a company in Spain apparently funded by one of the Puerto Rican companies and operated by Anthony. Anthony's alleged interest therein was not disclosed in the records of probate of his estate; nor, except as indicated below, did it disclose Anthony's alleged interest in Island Can Corporation, a Unanue family corporation.[30]

In 1986 when Robert and Joseph filed a complaint as co-trustees of Anthony's testamentary trusts to transfer

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[30] In 1976, Island Can had little, if any, value; but its existence was disclosed in Anthony's will, which is part of the probate record of his estate.

their situs from New Jersey to Puerto Rico, they asserted that Anthony's one-third interest in Island Can was worth about $1,150,000.00.

The charge is made that Anthony's assets were being hidden for inheritance and estate tax purposes and that, therefore, the testimony of Frank, Robert and Joseph generally must be discredited. Additionally, it is claimed, the asserted lack of knowledge of the ownership interests, including that of Anthony, testified to be Frank and Robert, seriously impugns their other testimony.

But the entire inquiry as to Anthony's estate and interests, as well as the treatment thereof in tax returns and probate proceedings involving that estate, is truly collateral and remote in nature. They relate to the administration of Anthony's estate. The reasons for not so disclosing his interests, if any, in the two companies and the asserted lack of knowledge at trial as to the Spanish company ownership may well raise questions as to credibility of Robert, Frank and Joseph. But, in the context of all of the evidence in this case, they are in no sense so significant as to adversely affect the finding of New Jersey domicile for Prudencio on the two dates here involved.

Charles claims that, by vitrue of Prudencio's alleged stuporous condition during the last 6 months of his life, he must be deemed to have died as a domicilary of Puerto Rico.

Although Dr. Noguera did not say that Prudencio was stuporous in the last 6 months of his life, he did state that during that period Prudencio had very little physical activity, was sleeping most of the time, had difficulty speaking or moving his arms, and, as in the case of many patients with cerebral pathology, was frequently stuporous during the last few months. He further said that there was a drastic change and deterioration in him in the last 6 months; and towards the end he rarely responded to the doctor or recognized or understood him. According to

Noguera, Prudencio was unable to take care of his own affairs during this 6 month period.

Assuming, without deciding, that Dr. Noguera's assessment of Prudencio's physical and mental condition was accurate, that assessment is no basis for concluding that at death his domicile was Puerto Rico, in light of the proofs in this case relating to his established New Jersey domicile.

Charles relies on a Federal statute, 48 *U.S.C.A.* § 733 (a) (all United States citizens who have resided after March 4, 1927 in Puerto Rico for one year shall be citizens of Puerto Rico), as well as a Tax Court opinion, *Roxbury Tp. v. Heydt*, 6 *N.J. Tax* 73, 77 (1983), equating the term "citizenship" generally with domicile. These are of no relevance to a determination of Prudencio's domicile in this case. Further, they do not mandate or otherwise support a finding of Puerto Rican domicile for Prudencio at or prior to his death.

Nor does *In re Estate of Gillmore*, 101 *N.J. Super.* 77, 87-91 (App. Div. 1968), certif. den. 52 *N.J.* 175 (1968), cited by Charles, support his claim. That case involved, according to its opinion, "unique circumstances." The court there held that an incompetent, who, at the time she left her New York home to live in New Jersey, was "so advanced in senility that she did not possess the requisite mental capacity to make a new domicile by choice," acquired a domicile in New Jersey by operation of law. The fact pattern in *Gillmore* is so different from the facts in the instant case as to make that unusual case without any precedential value here. The mere fact that Prudencio may have been physically or mentally incapacitated for a short period of time—even 6 months—does not mean that, throughout his stay in Puerto Rico and his residence in the United States, he did not intend New Jersey to be his permanent home. *Cf. O'Hara v. Glaser, supra*, 60 *N.J.* at 248-249; *Cromwell v. Neeld, supra; In re Michelsohn, supra; Shenton v. Abbott, supra*; and other cases *supra*,

relating to death in another jurisdiction in which the person resided for some time. Unlike the situation in *Gillmore*, Prudencio had not come to spend the rest of his days in Puerto Rico and remain there "with as much permanency as life affords"; nor, as in *O'Hara*, was it at all plain that he never intended to return to New Jersey.

Charles claims that the provisions in the 1974 settlement amendment (see Appendix I to this opinion), in which he agreed, among other things, to waive his right to inherit assets from Prudencio and not to contest Prudencio's Will or Trust, are proof that Prudencio was a Puerto Rico domiciliary. If New Jersey was really his domicile, it is argued, such a provision would not have been required of Charles. But he has unduly and erroneously focused on the issue of domicile as the reason for these provisions in 1974. There are other bases for attack on a will or trust, such as lack of capacity, undue influence and the like.

In the interest of completeness, a discussion is warranted as to the status of the Trust and the estate at the time Charles raised the issues in this case.

Prudencio's November 16, 1970 Will was probated before the Bergen County Surrogate in August, 1976, and the estate was administered in New Jersey and closed in 1981. The November 16, 1970 Trust also continued to be administered in New Jersey. After 1981, several grandchildren became eligible and received their shares under the Trust. In 1987, this Court approved the First Accounting of the Trustees under the Trust, over the objection of Charles' son, C. Jeffrey Unanue, one of the beneficiaries.

Prudencio's estate filed a Federal estate tax return indicating the decedent's domicile at death as Tenafly, New Jersey. The estate also filed a New Jersey resident inheritance tax return. The IRS issued a closing letter on June

10, 1980, accepting the return (with some minor adjustments). The New Jersey return was also accepted in 1980. A non-resident return was filed and accepted in Puerto Rico in 1981.

* * * *

Attached to this opinion are Appendix II, relating to Prudencio's estate plan, and Appendix III, setting forth summaries of testimony of some of the witnesses, other than Charles, Joseph and Frank, and other evidence, which I find strongly support the conclusions reached herein as to Prudencio's New Jersey domicile on the dates in question.

PROOF BURDENS AND CONCLUSION

I have found that Prudencio's long period of residence in New Jersey on or before November 16, 1970, predicated on all of the credible evidence, clearly established a New Jersey domicile for him as of that date. I have also found a New Jersey domicile until he left for Puerto Rico in November 1970. Since no person is ever without a domicile, a presumption arises that Prudencio continued as a domiciliary of New Jersey until it is proven that he acquired a new domicile in Puerto Rico. *Lyon v. Glaser, supra*, 60 *N.J.* at 277-278. As a result of this presumption, Charles Unanue, who claims that Puerto Rico became or was Prudencio's domicile before his death, had the duty of going forward with evidence to rebut the presumption of a continued New Jersey domicile by showing the physical assumption of a home in Puerto Rico, accompanied by an intention to acquire a new domicile there and to abandon the old New Jersey domicile. The existence of certain factors weakens the force of the presumption of continued domicile. For example, a home or residence in another state or country is commonly regarded as *prima facie* evidence of a new domicile, and the longer the period

of the new residence the stronger this *prima facie* case becomes. Such proof of residence elsewhere returns the burden of going forward with proof that Prudencio's New Jersey domicile was not abandoned to the proponents of continuance of that domicile. *See also, Citizens Bank & Trust Co. v. Glaser, supra*, 70 *N.J.* at 81.

I am satisfied that Charles Unanue has not rebutted the presumption that a New Jersey domicile continued as of November 16, 1970, when the trust agreement was executed, and at such time in November when Prudencio left for Puerto Rico. But once Prudencio remained and resided in Puerto Rico for the lengthy period of time between November, 1970 and his death on March 17, 1976, a presumption or *prima facie* case of Puerto Rican domicile was established in Charles' favor.

The burden was then on plaintiffs to prove by a preponderance of the evidence that Prudencio had not abandoned New Jersey as his domicile while thus residing in Puerto Rico. Plaintiffs have met that burden.

Plaintiffs have also plainly carried the overall burden of persuasion by proving, by a preponderance of the evidence, that Prudencio's domicile was always in New Jersey and that he never abandoned or intended to abandon that domicile on or after his stay in Puerto Rico from any time in November 1970, until his death.

As I pointed out during trial, there are other flexible formulations of who should carry the burden of proof or persuasion, established in other contexts by the Supreme Court. *See* e.g., *Lascari v. Board of Educ.*, 116 *N.J.* 30, 45 (1989); *Romano v. Kimmelman*, 96 *N.J.* 66, 89 (1984). But the governing law relating to the proof of domicile has been firmly declared in the *Lyon* and *Citizens Bank and Trust Co.* cases. I am following the principles clearly set forth in those opinions and find no reason to depart therefrom in this case.

In any event, as indicated, I have determined that even if plaintiffs had the ultimate burden of persuasion or proof of New Jersey domicile both prior to and after November, 1970, under *Lascari* and *Romano*, they have sustained that burden as well. Charles' evidence, even if considered in the aggregate, does not undermine or overcome the persuasive proofs presented by plaintiffs as to Prudencio's New Jersey domicile until his death in 1976.

Accordingly, I conclude that plaintiffs have established by the proofs that Prudencio was domiciled in New Jersey when the trust agreement was executed on November 16, 1970 and at his death in Puerto Rico on March 17, 1976.

APPENDIX I

Charles' Dismissal and the 1972 and 1974 Settlement Agreements

Charles' dismissal from the Unanue family companies in June, 1969, was the culmination of several years of discord between Charles and his family. Problems began, according to credible testimony, in 1966 when Charles began giving orders to Joseph in New York and Frank in Puerto Rico, but doing little work himself. Prudencio, however, did not complain about Charles' conduct.

Charles' actions became more troublesome to Prudencio after Charles organized a testimonial dinner in Prudencio's honor. On the weekend of April 6, 1968, the testimonial was held at the San Geronimo Hilton Hotel in San Juan, Puerto Rico. It was very heavily attended. After the testimonial, Prudencio was upset, since he had read a newspaper which said that the purpose of the testimonial was to retire him and provide a coming out party for Charles' new wife, Liliane. Prudencio indicated that another person, unnamed, also told him that Charles intended to retire him. According to Frank, Charles never stated that he set up the testimonial to retire Prudencio. However, Charles did tell him that he believed it was time for Prudencio to retire and that change was needed in management.

Charles relationship with Prudencio and his brothers became more strained when, after reviewing the figures of the fiscal year which ended in mid-1968, Charles requested access to the physical inventories of the Goya companies, including those in Puerto Rico. According to Charles, Joseph and Frank refused this request but admitted that the inventories of all of the companies were understated. In August, 1968, Charles and his brothers signed a contract in which Joseph and Frank agreed to correct the inventories prior to the end of the next fiscal year. To guarantee their compliance, they stated that

Charles would be made Chief Executive Officer of the Puerto Rican companies and be given a continuing option to sell his shares to his brothers, if he ever decided to sell, at a price based in part on the book value of the shares. While the exact circumstances surrounding the 1968 negotiations are not clear, it is undisputed that as 1968 drew to a close, a rift was developing between Charles and his family.

Prudencio's feelings towards Charles in early 1969 was evident in a February 17, 1969 letter. In response to Charles' request for more authority at Puerto Rican Food Products, and, apparently, at Goya, Prudencio indicated that Charles' request for change in management control would not be met, since the business was successful and progressing well without such a change. Prudencio was not willing to alter the power structure of his businesses to please Charles.

As a result of the continuing disputes between Charles and other family members, buyout negotiations took place in April and May of 1969. On May 8, 1969, there was a meeting at which a settlement was proposed. Prudencio was aware of these negotiations. Charles would be bought out but was given two years to get a buyer for all the companies except Zolmar, a realty company. It is unclear why negotiations broke down. However, it appears that problems were created as a result of Charles' displeasure with the exclusion of Zolmar from the agreement and the family's concern with the possibility of Charles' selling his business interests to an outsider. At the end of the May 8 meeting, another meeting was scheduled for May 10, 1969.

Yet, on May 9, 1969, Charles sent letters to the companies' accountants demanding audited inventories of Goya and the two Puerto Rican companies and a special audit of Zolmar. Charles claims that he took this action since he still had an option to sell and wanted accurate

inventories for that purpose and, also, so that he would not become involved in any possible tax evasion problem.

Charles' situation vis-a-vis his brothers worsened on May 18, 1969 when he asked Joseph for a key to the safe deposit box which held all the shares of Goya stock. Charles found that some of his stock was missing and he accused Joseph of being a thief. Charles later told Joseph and Anthony that to avoid being the "fall guy," he would hold a press conference.

Whatever his actual motivation therefor was, Charles held a press conference on May 29, 1969, at the New York Hilton. At the press conference Charles stated, among other things, that he was being ousted from the Goya companies because he refused to go along with schemes involving tax evasion, hidden inventories, and the transfer of profits to the tax-exempt Puerto Rican companies.

Charles' demand for a public accounting and a later demand for an IRS investigation resulted in such an investigation and required the payment of money by the companies to the government. Additionally, Charles had placed the business and family matters in the public domain, thereby posing a threat of serious harm to what Prudencio had built up over the years. These were cardinal sins in Prudencio's eyes and were regarded as acts of betrayal. In June, 1969, Charles' status as an officer, director and employee of Goya and the other Unanue family companies was terminated.

Although Charles was no longer an officer, director and employee of the companies, he still held a stockholder's interest in them. Various differences respecting the operation of the companies and the rights and obligations of their stockholders, officers and directors led to litigation in New York, Delaware, Puerto Rico and elsewhere. In an effort to settle such matters amicably, on June 9, 1972, a Settlement Agreement was negotiated. The Agreement

provided for the resolution of all disputes between Charles and the family-owned companies through the purchase by the companies of all of Charles' interests in them. Charles was to receive payment of $4,500,000 plus interest for that purchase. The parties agreed to discontinue all litigation and to exchange mutual general releases.

Despite the language of the 1972 Agreement, the settlement broke down in 1973 amidst accusations of default. This led to further litigation in New York. In an effort to resolve these differences, Charles and his family entered into the July 31, 1974 Amendment of the 1972 Settlement Agreement. The $4,500,000 in the 1972 agreement was "revised" to $4,300,000 but the payment thereof was accelerated. By signing the 1974 Amendment, Charles expressly agreed irrevocably to disclaim and renounce any and all interest he had or ever would have in the assets or estate of Prudencio, whether under any will or trust, by intestacy, by virture of relationship, by operation of law, or otherwise. Further, Charles promised never to bring any claim or suit, among other things, contesting or objecting to Prudencio's will or trust. He also agreed not to interfere with the deposition of assets or stock by Prudencio, his estate, the beneficiaries or his brothers. He further promised in essence to refrain from instituting or maintaining any further litigation involving the companies, Prudencio, his brothers or any other family member.

In exchange for his promises, Charles received payments exceeding $4.3 million. The payments were completed in 1975.

I need not decide whether Charles' construction at trial of the provisions of the settlement agreements justifies, as he claims, his instituting the present action. Apart from matters of credibility, developed at that phase of hearing, that issue does not concern the question of Prudencio's domicile.

Charles Relationship with Prudencio and Carolina after June 1969

Charles' recollection of his last conversation with Prudencio is not entirely clear. However, in response to the court's questioning, Charles testified that during this conversation, which occurred in the Tenafly house in August of 1969, he told Prudencio that he had evidence that Samuel Siegel, the companies' attorney, had stolen a substantial sum of money from Zolmar, the Unanue realty company. Prudencio would not face Charles and turned his back to him. Prudencio said he would believe Siegel before he believed Charles and did not want to see any evidence Charles had against Siegel. He also told Charles he did not want to see him any more, since Charles had betrayed him and his brothers by forcing them to pay money to the government.

There was also a later and more formal exchange between Charles and Prudencio at the June 1, 1970, Goya Foods, Inc. annual meeting of stockholders. It appears that this was the last time that Charles and Prudencio spoke with each other.

Charles had limited contact with Carolina, his mother, after 1969. Between 1970 and 1983, Charles never visited his mother despite the fact that Charles' residence in San Juan was approximately one mile from the Kings Court apartment where she lived. Charles sometimes returned letters from Carolina to her unopened, since he did not want her to write to him. Charles recalled that at times he hung up on his mother's telephone calls. Charles also testified that he did not call Carolina to offer condolences when he learned of Prudencio's death because he "didn't want to open up old wounds."

APPENDIX II

Prudencio Unanue's Estate Plan

The significant dispositions by the Will and the Trust of November 16, 1970 were essentially a continuation of an estate plan established by Prudencio in a will of March 24, 1969 and followed in subsequent wills of October 9, 1969 and October 23, 1970. Each contained a testamentary trust. After the provisions as to the income to Carolina for life, the beneficiaries of the residuary estate in each of these prior wills were Prudencio's grandchildren (not his sons), who were to receive their share of the corpus of the testamentary trust at a specified age. The November 16, 1970 documents were different in the sense that there was both a will and an *inter vivos* trust. But that will left the residue of the estate to the trustees under the Trust and added it to the trust estate for administration and distribution in accordance with the terms of the Trust. Prudencio, during his lifetime, was an income beneficiary; Carolina, at his death, was an income beneficiary. The ultimate beneficiaries of the Trust, after Carolina's death, were the grandchildren (not Prudencio's sons), who would receive their share of the corpus at a specified age.[1]

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[1] The March 24, 1969 will gave Carolina a power of appointment over 50% of the testamentary trust. The other wills and the Trust left 100% of the trust corpus, after Carolina's death, to the grandchildren.

APPENDIX III

Summary of Evidence Supporting New Jersey Domicile

There is set forth below some of the evidence that clearly supports Prudencio's intent and desire to return to the place he considered his permanent home in Tenafly, New Jersey even while seriously ill and near the end of his life.

I.

Roberto Perez, a long-time employee of Goya, stationed in Chicago, was an unshakable and completely credible witness.

An anti-Castro Cuban, after 36 years in Cuba, he left in 1961 to reside in the United States. Some time in August 1961, he was given a job at Goya by Prudencio and Charles.

From September 1961 until February 1963, he was a broker for Goya on a commission basis, working out of its Brooklyn facility. He saw Prudencio at the office and at Prudencio's home, except when Prudencio left for the winters in Puerto Rico. He brought his weekly collections to Prudencio at his Tenafly home while Prudencio lived there. He and Prudencio liked to talk with each other in Spanish. They discussed details of Goya business and Prudencio would give him advice with respect to his job, as well as other matters.

Prudencio informed him that he would have to live in the United States, since communism would remain in Cuba; that Perez would learn to love the United States, which was the land of opportunity, as much as he did; and that Prudencio did not consider Spain to be his country, since, he said, it was in the United States where he lived with his family and earned a living. Prudencio further stated that he would live and die in the United States. Prudencio was a strong character with strong feelings and He stated that he would never retire even though he had

money, since if he retired he would become a vegetable. views as to his children, his business, and other matters.

Prudencio told him the decorator had put in a cabinet or armoire in the dining room in the Tenafly house which he did not like. He replaced the armoire with a stereo similar to one that Perez had acquired, after Perez informed him of that acquisition.

In February 1963 Perez was sent by Prudencio to Chicago as a Goya broker and salesman. His family followed him there. Chicago's cold weather was detrimental to his wife's health, since she needed a warm climate. In January 1978 he became general manager of the Goya warehouse and operations in Chicago.

From February 1963 until Prudencio left for Puerto Rico in November 1970, Perez spoke to Prudencio many times by telephone and in person. One of the arguments they had related to whether Perez should be salaried or be on commission.

Between 1963, after his move to Chicago, and November, 1970 he saw Prudencio in almost every May of each year in the Brooklyn office of Goya. Perez would know about a week before Prudencio left for Puerto Rico that he was leaving. Perez loved Prudencio and liked to speak with him.

During their various discussions, both before and after 1963, Prudencio stated that he had arthritis, and when winter came, he felt better in the warm weather of Puerto Rico. He said that he did not go to Puerto Rico to rest—he went to see about gandules and the operations there. He refused Perez' request to transfer from Chicago to Puerto Rico because of weather, saying in effect that neither of them was going to reside in Puerto Rico, that they would both have to live with the cold, and that both of them would live and die in the United States. Prudencio discussed with Perez (1) how he developed the successful Goya company in New York; (2) his establishment of the

Puerto Rico companies; (3) and the extent of the sales at the Goya New York company. According to Perez, Prudencio was a "tremendous salesman".

He saw Prudencio three times while Prudencio was alive in Puerto Rico:

(a) In the winter, 1967 Charles and Prudencio were in Puerto Rico to discuss a plan with Perez which would lower his sales. At that time, Charles told him that he let his parents use his apartment when they came to Puerto Rico and that, accordingly, he had a very small apartment. Prudencio seemed well for his age. He rode in a motorized wheelchair. He also walked leaning on Perez. He was physically strong and mentally alert. Prudencio showed Perez around the Bayamon plant, pointed out the cleanliness of the operations, and said he was happy with the way his sons were running the business there. In response to Perez' questions as to why he did not live in pretty Puerto Rico all of the time and allow Perez to do so as well, Prudencio stated that his place and that of Perez was in the United States.

(b) At the April 6, 1968 testimonial dinner for Prudencio in Puerto Rico, Perez was there about 3 or 4 days. Prudencio looked well.

(c) Sometime in 1975, towards the end of Prudencio's life, some of Perez' Chicago customers were on a cruise to San Juan. Perez was there to entertain them. He saw Prudencio at his apartment: he looked old and had a look of death on his face. He could not speak; but he gestured with his head and smiled. Perez spoke to him, even though one or more of his sons told Perez not to visit Prudencio or to talk about business with him. They told Perez that such a discussion would make Prudencio feel badly, since he was required to remain in Puerto Rico and could not return to the United States by reason of illness, while Perez was able to reside in the United States. Prudencio

was on a heavy chair with his legs covered. His mind appeared to be clear. He understood Perez. Perez informed Prudencio that the nice weather in Puerto Rico must make him happy. Prudencio moved his head in a "no" gesture. In response to a question as to whether he wanted to return, he smiled and nodded "yes". When Perez said that they would soon see each other in the United States and that Prudencio was needed in Brooklyn, Prudencio nodded in an affirmative manner, his face and eyes lit up and he smiled. Perez asked the sons why the Secaucus Inaugural had not taken place. They said they were waiting for Prudencio to be well enough to attend.

II.

Dr. Almodovar's testimony as to Prudencio's firm intent to return to New Jersey has already been discussed. Dr. Almodovar also testified that, before his stroke, Prudencio informed him that he had a very successful business in New York, known as Goya, with about 70 employees and that he often visited the Puerto Rican business facilities. He also described his Tenafly home as being more comfortable than the Kings Court apartment, and as having a large green lawn and a large basement to entertain people. According to Almodovar, although the apartment was located in a wealthy neighborhood, it was very crowded, despite the fact that it had three bedrooms. Carolina told Almodovar that the Tenafly home had a spacious kitchen and a substantial lawn. Both Prudencio and Carolina said they wanted to return to their home in New Jersey and he wanted to return to his business in New York.

According to Almodovar, even before his stroke Prudencio needed assistance getting in and out of bed and moving around. He also had to have the catheter, which was changed at least once per month, attended to and its bag affixed to his thigh or bed, if he were in bed.

III.

Dr. Luis Sanchez-Longo, a neurologist, was impressive and truthful. He was called in by Dr. Noguera, an internist and cardiologist, in January 1972 when Prudencio, then 85 years of age, had his stroke. He examined and treated Prudencio at Teacher's Hospital, and, after his discharge, at his Kings Court apartment during 1972, 1973 and 1974. Prudencio never informed Sanchez-Longo that he wanted to return to New Jersey. However, as stated below, in 1972 and 1973, Carolina asked him whether they could go back to New Jersey eventually.

Sanchez-Longo stated that after his January 1972 stroke Prudencio was too ill to be moved or to travel but that he expected sufficient improvement eventually for him to be able to travel. In those days it was extremely dangerous to travel with the kind of physical ailments that Prudencio had. According to Sanchez-Longo, Prudencio was then suffering from the following: hypertension; atrial fibrillation; arteriosclerotic heart disease; chronic heart failure; stroke; arthritis of the hip; lymphangitis; leg ulcers; uremia; anemia; prostate hypertrophy; and cancer of the prostate.

Sanchez-Longo also testified that after the January, 1972 stroke, Prudencio spoke slowly with short expressions and sentences, but he could be understood. He could also use his hands. His right side remained partially paralyzed up to the date of his death.

According to Sanchez-Longo, after the stroke Prudencio had transient ischemic attacks (TIA) in late 1973 and March, 1974 involving a diminished flow of blood to the brain that caused him to faint. He returned to his prior condition fairly quickly. The TIA in March 1974 was more prolonged and resulted in further speech difficulty and weakness of his right side. But he recovered in a relatively short period of time—whether it be 12 hours or 2 or 3 days. After such recovery his ability to speak did not get worse and he did not become more paralyzed.

His condition improved after his discharge from the hospital in 1972 and in subsequent years. His prime cause for complaint was the discomfort from the catheter and frustration by reason of not being able to speak more fluently. His judgment and mental capacity were good and he could make decisions. He became able to pick things up and use his right hand in eating and waving goodbye.

In the summer of 1974 he was able to eat with both hands, and move with little steps. He also spoke in short words and sentences. He was generally pleasant and smiling and was mentally competent. He had reached a plateau of improvement.

In the spring of 1974 he was able to write his name. However, his ability to do this seemed to deteriorate by the summer of 1974. Nevertheless, his ability to write at a specific time might be caused by emotional factors or tiredness. Thus, although he signed a July 31, 1974 and a November 20, 1975 document with an "x", he was able to sign his shaky full name on a July 23, 1975 document.

Sanchez-Longo considered the Kings Court apartment to be large. But Carolina expressed a contrary view to him. In 1972 and in 1973, she asked him whether they could return to New Jersey. He informed her that Prudencio was then too ill to travel but he might get better and eventually might be able to make the trip. In 1972 and 1973, it would have been too risky to travel. Carolina could not adequately care for him in New Jersey.

Carolina told him that they came to Puerto Rico only for the winters; that their permanent home was in New Jersey; that most of her children and grandchildren were there; that her home there was much bigger than the apartment and had a lawn; that the apartment bedroom and the apartment itself was too small; that the apartment was inconvenient and lacked sufficient kitchen and closet space; that Prudencio's business was in the New Jersey

area, and that eventually they both wanted to return to New Jersey. She also said that Prudencio participated in business meetings at the Puerto Rico companies before January 1972.

Although Sanchez-Longo found the apartment large, it had old furniture and, in his view, was not the kind of plush residence that someone in Prudencio's financial condition should have. In 1974, Prudencio could have travelled only under the following conditions: (1) a formal travel request to the physicians had to be made; (2) the three physicians agreed; (3) the plane had oxygen available; and (4) a physician and nurses accompanied him on the plane.

In the summer of 1974, when Sanchez-Longo last saw him, Prudencio was sufficiently stabilized neurologically so that if Drs. Almodovar and Noguera approved his travel to New Jersey and Prudencio wanted to go, despite the need for the catheter, Sanchez-Longo would have approved.

IV.

Dr. Juan Noguera, a cardiologist, who testified via a deposition, was asked by Almodovar to evaluate Prudencio's cardiac status on January 17, 1971 at Teacher's Hospital when Almodovar had hospitalized him for his serious urinary and prostate condition. Although he left the hospital on March 4, 1971 in "excellent shape," on April 13, 1971 and thereafter, Prudencio's coronary problems required treatment. He saw Prudencio at home and in Noguera's office. No one ever asked him at any time whether Prudencio could travel to New Jersey.

Had he been asked after the first hospitalization—in 1971—he would have given permission for Prudencio to travel to the United States; but after the stroke hospitalization in 1972, he would have been more careful before permitting such a trip. When Prudencio was admitted to the hospital in January, 1972 he had a fever, which could have resulted from the use of the catheter.

After the stroke his congestive heart failure worsened. Nevertheless, Noguera would have permitted Prudencio to travel within two weeks of his February 7, 1972 hospitalization for the stroke, provided one family member and a nurse accompanied him. He was unable to walk and would have had to be carried on and off to his plane seat.

He considered the March 1974 faint and the other similar episodes small cerebral thromboses. In the last six months preceding his death, Prudencio's prostate and congestive heart failure problems worsened.

After the March 1974 episode Prudencio recovered rapidly and for almost a year he maintaained fairly adequate activity. Nevertheless, at that time, Noguera would not have recommended travel unless the Unanues specfically requested it. In an earlier sworn statement, Noguera said that after late 1973 or early 1974, Prudencio would need a properly equipped and staffed plane to travel. However, in his deposition used at trial, he stated that this precaution would not be necessary. In the last year of his life Noguera would not have permitted Prudencio to travel without a physician.

After the January 1972 stroke, Prudencio spoke sentences and was very alert and conversational. He understood what Noguera said and Noguera understood him. Except as to the TIA—small stroke dispute with Sanchez-Longo, however, his discussion of Prudencio's physical condition since the initial 1971 hospitalization accords substantially with the evidence given by Almodovar and Sanchez-Longo.

There are, nevertheless, some inherent inconsistencies in his testimony relating to his views as to the travel question.

Noguera referred to Sanchez-Longo as probably the most able man to treat cerebral thrombosis. I have already found that Prudencio's subjective concern about travelling with the catheter and his desire to be near Dr.

Almodovar until he was no longer required to use it were sufficient to justify his continued stay in Puerto Rico. After consideration of all of the evidence, I am satisfied that the opinions of Almodovar and Sanchez-Longo on the travel issue are entitled to greater weight than those expressed by Noguera, particularly since they take into account their patient's reasonable fears.

V.

Apart from statements to others and other credible proofs, Prudencio and Carolina expressed their clear intent to return to Tenafly in their letters of June 22, 1972 and September 30, 1972, relating to a request to have the roof on the house repaired and other matters. These, as well as Frank Unanue's related letter of July 3, 1972, are discussed elsewhere in this opinion.

VI.

Father Joaquin Mansilla is a priest who visited the Kings Court apartment weekly from 1971 to March 1976 to give communion to Prudencio. He stated that the apartment was big but was sparsely furnished. The furniture appeared to be of a "provisional" nature. He was able to speak with Prudencio until his death. But, apparently from the 1972 stroke onward, Prudencio could grasp and follow what Father Mansilla was saying and Mansilla could understand what Prudencio was saying with the assistance of Carolina.

VII.

Santos Casal Valdes ("Santos") is Joseph's mother-in-law and aunt; Carmen Ana's mother; and the grandmother of Joseph F. Unanue ("Joseph, Jr."). She is the widow of Carolina's brother Ulpiano and resides and has always resided in Puerto Rico. She was very friendly with and close to Carolina, Prudencio and Ana Maria while they resided in Puerto Rico from November 1970 onward.

She wrote letters to Joseph and Joseph Jr. in 1971 and 1976 that shed light, from a neutral source, on Prudencio's intention and physical and alert mental condition at the time involved.

The March 10, 1971 letter from her to Joseph was sent to wish him a happy birthday. It confirms Prudencio's intention to return to Tenafly and not to remain in Puerto Rico.

The letter is dated 6 days after Prudencio's release from Teacher's Hospital. He had been confined there on an emergency basis by Dr. Almodovar from January 18 to March 14, 1971. Thus, at that time, notwithstanding his need to use the catheter, he was seriously hoping and intending to go back to New Jersey. Part of the letter bears repeating:

> "Prudencio is fairly well . . . and, according to what he told me last night, he is thinking of going to the office on Saturday, how do you like that? Furthermore, he is thinking of going to Tenafly. Thanks to God he is with a lot of spirit, I think that if he continues eating like now he will live a few more years, God willing . . . he inspires respect . . .

In 1975 and 1976, while Joseph Jr. was in college, he received letters from her.

In an October 21, 1975 letter she stated that Prudencio was still the same but "his head like always he notices everything". The same type of information is given in her letter of January 23, 1976, which adds that Prudencio's "head is perfect." An earlier letter of November 11, 1975 at about the time Prudencio signed the cotrustees' delegation of authority with an "x" or mark, asserts that Prudencio was "more or less the same."

Letters to Joseph, Jr. after the deaths of Prudencio and Anthony indicate that Carolina had become very quiet,

despondent and reclusive. She died in 1984 in Puerto Rico while residing in the Kings Court apartment.

VIII.

Carmen Ana Unanue, Joseph's wife and Joseph Jr.'s mother, impressed me as also being a very honest and truthful witness, even though she has an interest in this litigation.

She resided with her parents in Puerto Rico before her marriage to Joseph in February, 1956. From 1951 until 1956, she visited Prudencio and Carolina during each summer in their Bogota home. She also visited with them in Puerto Rico when they were there during the winters. They often came to see her parents, Santos and Ulpiano Casal Valdes. She stated that in Bogota Carolina went shopping, to the bank and to church alone; that although she did not speak fluent English, she talked to her neighbors and made herself understood in English. Carolina loved to garden and grow flowers at the Bogota house.

The move to the Tenafly home soon after July 16, 1962 was prompted by Prudencio's painful hip and arthritic condition. He and his sons decided that a one-level house, with the bathrooms on that level, would be better for him. The Bogota house had three floors, steps, and only one bedroom, with no bathroom, on the first floor. Prudencio had trouble climbing stairs.

Between July 3, and July 16, 1962, when Ana Marie left the hospital in Teaneck, Carolina and Carmen Ana moved clothing and other personal items, including silver, glasses and clothing, from the Bogota house to the new Tenafly home. The Tenafly house was fully furnished by decorators hired by Charles' wife Lois and Frank's wife, Diana. It had 4 bedrooms and 2 bathrooms and a large kitchen, all on one floor, with a kitchenette in the basement. The grounds surrounding the house were substantial and beautiful. Carolina often weeded and gardened

there. She planted a fence of evergreens, with the assistance of Carmen Ana and a gardener, and begonias.

Prudencio and Carolina were friendly and visited with their neighbors in both Bogota and Tenafly. Prudencio loved the Bogota house where his sons grew up and considered the many years he lived there as happy ones. He did not wish to move to Tenafly.

Although at the beginning, neither Prudencio or Carolina felt at home in Tenafly, after a few years they adjusted and began to like living there. When Carolina complained that, by reasons of distance, she could no longer walk to church or to shop, Prudencio advised her to use a taxicab.

Carmen Ana first met Prudencio and Carolina in 1947 at their Bogota house when she came from Puerto Rico to visit. From the summer of 1947 until June, 1951, she went to school near West Point (Ladycliff) and in New York (Mt. St. Vincent). Neighbors of Carolina in Bogota helped her get admitted into Ladycliff. Her parents resided in the Bogoto house from September until February during those years. When Prudencio and Carolina were in Puerto Rico during their stays in 1949 and thereafter, her parents were in Bogota with Ana Maria and Pepe. Carmen Ana stayed at the Bogota house weekends while at school.

In late 1949 Prudencio and Carolina went to Puerto Rico and stayed at her parents' home. Ana Maria did not travel with them to Puerto Rico, except in 1956 when Carmen Ana was married, until Frank was married in November 1961. Ana Maria remained at the Bogota house to take care of Frank, who lived at home. In 1950, her parents and Ana Maria went to Europe and she and the four boys resided in the Bogota house. During that period, which was in the winter months, Prudencio and Carolina were in her parents' Puerto Rican home. Prudencio had recently bought a factory there and, commencing in 1949 or 1950, started taking winter vacations

in Puerto Rico with Carolina to check on its operations and to alleviate the pain in his leg and hip. Prudencio was also afraid of falling on the ice.

From 1956, when she married Joseph, until the summer of 1962, she resided in Puerto Rico with Joseph. During the winter months she saw Prudencio and Carolina at the various apartments rented by "the boys:" Darlington, an apartment above a store, a house on Geronimo Street and the Kings Court apartment. They came to Puerto Rico usually around Thanksgiving. In 1959, they left in December, since Carmen Ana had taken her daughter to the United States for treatment. She spent Thanksgiving that year with Prudencio and Carolina in Bogota.

Once, when she visited them in Bogota, while she was a student at Mt. St. Vincent School, Prudencio told her that he had voted for Dewey in the Truman-Dewey election.

Carmen Ana and Joseph resided in the Bogota house from mid-1962, when Prudencio and Carolina moved to Tenafly. Carolina and Ana Maria attended church regularly in Bogota (St. Joseph's) and Tenafly (Mt. Carmel).

Prudencio attended the 1963 and 1967 baptisms of Carmen Ana's children in Bogota. Prudencio contributed to the Community Chest in Bogota by giving money to his neighbor, Mr. Lockwood.

Before and after 1970, Prudencio, Carolina and Ana Maria were very concerned about Charles' children, Jeffrey and Randy, since Charles and his wife were "having trouble" and Charles had stopped visting with the children.

Carmen Ana visited Prudencio in Puerto Rico before and after the January 1972 stroke. He was always aware of the catheter and how it looked. Consequently, even before the stroke he sat, rather than stood, most of the time. After the stroke, he spoke to her, but rarely in sentences. His ability to speak varied from time to time. They could, however, understand each other, particularly

with Carolina's assistance. Towards the end of his life, he understood her but she could not understand him. After the stroke he was able soon to eat by himself but the nurses would also feed him.

She attended Prudencio's birthday party in the Kings Court apartment in April 1974, which was attended by, among others, his grandchildren. A picture of that party shows Prudencio seated and smiling, with a blanket over his legs to cover the catheter device.

Carmen Ana had the responsibility since the stroke, of picking up the mail at the Tenafly house and giving it to her husband. Among other things, the mail included their social security checks and the checks from the Puerto Rican farm (Finca Carolina). She also had the duty of having the garden in the Tenafly house taken care of and to respond to emergencies there. In 1971 or 1972 the pipes burst and she had to have repairs made so that Prudencio and Carolina could come back to an undamaged house.

When she spoke to Carolina, either by telephone or in Puerto Rico, Carolina asked about the Tenafly house and its gardener. She also asked about her Tenafly and Bogota neighbors. Carmen Ana spoke to Prudencio while in Puerto Rico after the stroke and asked whether he was coming home. He nodded in the affirmative. He loved the business and wanted to see what his sons were doing in New York at Goya.

After Anthony became ill, from late 1975 to late 1976, and for a few months after Anthony's death, his wife and two children moved into the Tenafly house. His widow Betty bought a house in Norwood and took all of the furniture from the Tenafly house to furnish it. This was after both Anthony and Prudencio died.

After Prudencio died, she and Joseph wanted Carolina to move into their home, which was first in Bogota (until August 1977) and then, Alpine, but she did not do so.

She was very depressed, hardly spoke, and seemed to have little, if any, desire to live.

Both Prudencio and Carolina wanted to return to New Jersey, among other reasons, to see their children here and their grandchildren, particularly Charles' children. One of Charles' children had been hospitalized for a drug problem; the other had had a nervous breakdown. Prudencio stated to her after November 1970 that he missed his home in New Jersey, his business in New York and his sons and grandchildren, and that he wanted to return to Tenafly.

Carolina told her that they could not return to New Jersey because Prudencio's health would not permit him to travel.

IX.

Joseph F. Unanue ("Joseph Jr."), the son of Joseph and Carmen Ana, was a most forthright witness, despite his interest in the outcome of this case.

He is the executive vice-president of Goya Foods, Inc. Born in 1957, he resided with his parents until 1962, when he moved with them to his grandparents' Bogota house.

The Bogota house had 3 stories. It had one bedroom and a den on the first floor; there were 4 bedrooms and a bathroom on the second floor, and 2 bedrooms and a small bathroom on the third floor. In the basement there was a bathroom, poolroom and a playroom with a bar. To get to the second floor, it was necessary to climb 1¼ flights of stairs. The house had a front lawn and a backyard with a garden maintained by Carolina. His grandparents' furniture was in the Bogota house when they moved in.

He recalls that in and after 1962 Prudencio stood upright but always used a cane. His ability to walk became

more difficult with the years. It was common knowledge in the family that Prudencio had arthritis.

At about the time Joseph Jr. came to reside in Bogota, his grandparents moved to the Tenafly house. It was a fairly large one story brick building with a large basement. It had a large yard, many trees, a barbecue and a basketball court. There was a living room, dining room, kitchen, 4 bedrooms (one of which was used as a sewing room) and 2 bathrooms.

Between 1962 and the time Prudencio and Carolina left for Puerto Rico in 1970, he and his siblings, as well as his parents, his uncle Frank and his cousins, including Charles' sons and Anthony's children, visited his grandparents in Tenafly. He visited them almost every weekend. On these visits, Prudencio would talk to his uncles and would watch the children play in the yard. He saw Charles there once in the early 1960's. The neighbors in Tenafly also visited both in the yard and the house and he and his cousins played with their children. Once or twice he and his cousins stayed overnight in Tenafly.

Between 1962 and 1970, he visited the Goya plant in Brooklyn with his father on Saturdays. Prudencio was there. He used a motorized chair there, as well as a cane. The office was on the second floor. Prudencio would get there via the freight elevator that transported the car in which he came. Prudencio had told him he used the motorized chair because of 'bad" legs.

During the 1962-1970 period, his grandparents resided in Tenafly, except when in Puerto Rico during the winters. At Christmas he and his family telephoned to Puerto Rico and spoke to Prudencio and Carolina. They stated that they would return to New Jersey when the spring came. From and after November 1970, when they stopped coming back to New Jersey, he visited them in Puerto Rico during his summer vacations. He visited them at the Kings Court apartment in Puerto Rico about

6 times from November, 1970 until March, 1976, when Prudencio died.

The aparement was on the eighth floor of a building with an elevator. It had a small kitchen, moderate size dining room-living room, a laundry room, 3 bedrooms and two bathrooms.

They could not attend his eighth grade graduation in 1971. He and his father visited them in Puerto Rico in the summer of 1971 to show his awards and diploma, staying at the house of his maternal grandmother, Santos. Prudencio was dressed in a robe and sat most of the time. He had been hospitalized earlier that year. He said he was feeling better and hoped to come back to Goya and New Jersey as soon as he was better. Carolina and Ana Maria also said, in response to Joseph Jr.'s statement that the grandchildren missed them, that they wanted to return but they had to wait until Prudencio was better. Carolina spoke to him principally in Spanish, since her English was limited.

Joseph Jr. attended a birthday party for Prudencio at the Kings Court apartment on April 6, 1972. He visited with Prudencio a few times during a 2 to 3 day period. He noticed a dramatic change in Prudencio, since he had had a stroke. He had trouble expressing himself in words. He spoke to Joseph, Jr. in Spanish; Joseph had difficulty understanding him. But Prudencio did indicate that he was looking forward to returning to Goya. Photos of the party in evidence show that Prudencio could then eat with both hands. He could walk if he used a walker and was assisted by a nurse.

There were about 20 people at the 1972 party. The birthday cake resembled a Goya can.

Carolina then seemed very positive about Prudencio's condition, saying that he was getting better.

Joseph Jr. also attended a birthday party for Prudencio in 1974 at the Kings court apartment. Prudencio sat in

a robe and pajamas in a chair, with a blanket on his lap. Although Joseph Jr. could not fully understand the few words that Prudencio spoke, except "yes" and "no", Cristobal Colon, an employee at the Puerto Rican facilities, and a good friend of Prudencio, who was present, could understand him and translated for Joseph, Jr. Prudencio was obviously frustrated at his inability to communicate better.

In 1972 or 1973, Ana Maria returned and stayed at the Tenafly house on a visit. Joseph Jr. visited her there.

During the period November 1970 through March 1976, at times he would accompany his mother Carmen Ana to check on the Tenafly house. The house was then in good livable condition. It contained the same furnishings as before. He visited Anthony's family in late 1975 or early 1976, after they had moved into the Tenafly house, while Anthony was hospitalized for leukemia. The furnishings were still unchanged.

He was in college in September, 1975, when the inauguration of Goya's Secaucus facilities took place. But he attended the inauguration. His father Joseph spoke at the ceremonies, stating that Prudencio would have liked to be there but could not make it because of his health.

He attended Prudencio's funeral in March, 1976. His father and uncle Frank attended. Anthony was too ill to be there. Charles was not there.

Prudencio was concerned primarily with his business and family. Neither her nor Carolina had many close personal friends.

X.

Christobal Colon, an employee of the Puerto Rico companies since November, 1954, and now the sales manager of Goya de Puerto Rico (formerly Puerto Rico Food Products), gave a very believable account of his relationship and discussions with Prudencio over the years. He

was truly a good friend of Prudencio and appears to have been on the same or similar "wave-length." They understood each other very well and were very close. It is true that he spoke to one of Charles' witnesses, Joseph Alvarez, as well as his wife, in Puerto Rico in 1989 in order to discover what Joseph Alvarez's testimony would be. It is also true that he, as an employee of the Puerto Rican companies, might be prejudiced in favor of those opposing Charles in this case. But, after considering his testimony and that of Alvarez, I am satisfied that Colon was telling the truth throughout his appearance on the witness stand, and that, although the contact with Alvarez was ill-advised, and may have been prompted by Frank Unanue, it was so minimal in nature that it does not detract from the essential credibility of his evidence. The same may be said as to his interest in the outcome of this lawsuit by reason of his claimed economic dependence on the Unanues other than Charles. I believe him when he states that he has a strong loyalty to the Unanues and that this loyalty extends to Charles. He was first hired by Charles in Puerto Rico and introduced himself to Prudencio on the day he started work on November 20, 1954.

Colon visited Prudencio at the New York Goya facility and at his Bogota house in 1957, 1958 and 1959. Thereafter and until 1970 he saw Prudencio at his home in Tenafly and the Goya New York office. Colon came to New York once each year to attend baseball games, as well as to visit Prudencio. He has been involved in baseball and other organized sports and youth work in Puerto Rico for 34 years. He stated that Prudencio liked sports and had Goya in New York and the Puerto Rican companies sponsor baseball teams. The Goya name was on the Puerto Rican team's uniforms.

Colon described the Tenafly house as having one level with a garage underneath.

He saw Prudencio from time to time in Puerto Rico from 1954 through 1970 in the winter months, from De-

cember through February. He visited and talked with Prudencio at the Puerto Rico Food Products plant in Bayamon and at the various places he stayed, including the Darlington apartments, an apartment above a grocery store, Borinquen Gardens and the Kings Court apartment.

Before November 1970, Prudencio came to Puerto Rico only for a few months each year, commencing in December. Prudencio told him that he came to Puerto Rico during these months because the climate was better for his leg problem, he liked to be there during the gandules season and he wanted to see the progress of the business expansion of Goya New York, which he had founded, to Puerto Rico. He stated that his sons were running the Puerto Rican operations.

During his visits to Puerto Rico, Colon chauffeured Prudencio around the island to find and buy gandules. He had also accompanied Charles before and during 1962 for this purpose.

When Prudencio was in Puerto Rico during the winter months 1955-1970, he would go to the Bayamon plant and work in his office or elsewhere in the factory. He would check on the products and give instructions to employees. He aslo attended and spoke at sales meetings there until his stroke in January, 1972.

Colon told of a sales meeting in November or December 1968, which Prudencio and Charles attended that was suspended at Charles' request. Prudencio liked to work.

Colon began visiting Prudencio in Puerto Rico on weekends in 1955 and the visits continued thereafter. They became very friendly and fond of each other.

It was Colon who took Prudencio to Dr. Almodovar's office on January 18, 1971 when Frank called to say Prudencio was very ill and in pain. Prudenacio then entered and stayed at Teacher's Hospital. He learned that Almodovar had inserted a catheter to remove urine from Prudencio. After Prudencio's release from the hospital in

March 1971, Colon visited him in the Kings Court apartment 3 or 4 times per week. He always had the catheter on.

In May 1971, when Prudencio was admitted to Auxilio Mutuo Hospital for surgery, he visited Prudencio almost every day. Prudencio told him that the doctor wanted to remove his testicles. Prudencio said that he was born with them and would die with them.

After his release from that hospital on June 14, 1971, Colon visited him at the Kings Court apartment about 4 to 5 times per week. Prudencio spoke about his New York business and desire to return to it and his home in New Jersey.

After the January 1972 hospitalization for Prudencio's stroke, Colon visited him almost every day at the hospital; and when he left the hospital, Colon visited him at home. Prudencio at first had difficulty speaking but after a while, Colon could understand what he was trying to say. He spoke in short words and gestures but could understand what others were saying. They discussed Prudencio's business in New York and Puerto Rico, sports, Goya's TV ads and the people appearing in them, the team that Colon was managing and whether it was winning. Prudencio often expressed a desire to return to his business in New York and to his Tenafly house.

Colon attended Prudencio's 1972 birthday party at the Kings Court apartment. Prudencio's grandchildren, Joseph, Frank, their spouses and others, including Goya and Puerto Rican employees, attended. At the party someone asked Prudencio when he was returning to New Jersey. He said that he would go back as soon as he got better.

Colon drove Prudencio to visit Drs. Almodovar and Sanchez-Longo. His visits to Almodovar included radiation treatments. Colon expressed the view that both Puerto Rico and the United States should be proud of

Prudencio, and that he was a fine example of what could be done in the United States by an immigrant from Spain.

Ever since his admission to the hospital in January 1971, until his death, Colon never saw Prudencio without the catheter on. Prudencio told him that the catheter bothered him and he wished it would be removed. He said he wanted the catheter removed so that he would be better and could travel.

Carolina informed Colon that she wanted to be back in her more comfortable and larger house in Tenafly as soon as Prudencio was better.

From February 1972 and until about 3 or 4 months before his death, Colon could understand most of Prudencio's phrases.

Prudencio told him that the inauguration of the Goya Secaucus facility was suspended from a date in late 1974 or early 1975 in order to see if he felt well enough to attend. Prudencio wanted to be there. Colon went to the adjourned inauguration in September 1975. When he returned, Prudencio could speak to him in short phrases. He informed Prudencio that it was a good inauguration. Through Prudencio's short words and gestures, Colon concluded that Prudencio stated that he was glad that it went well for the boys.

XI.

Anthony's son, Robert Unanue, was born in 1954. His first contact with his grandparents occurred in Prudencio's Bogota home. Robert recalled that the Bogota house was very big. In the house was a figure of Christ with eyes which Robert believed seemed to follow him. Robert also saw this figure of Christ in the Tenafly house but did not recall seeing it in the apartment in Puerto Rico.

During part of the summer of 1964, when his father left Maryland to rejoin Goya, their family stayed with

Prudencio and Carolina at the Tenafly house until they found a house in Norwood. During this period at the Tenafly house, he watched television on a remote control television set, including Spanish television, with Prudencio. Prudencio sat in his favorite chair in the living room next to the fireplace. Robert spoke with Prudencio, Carolina and his aunt in English.

From 1964 through 1973, until they went to Spain, Robert's family lived in Norwood. During that time, Robert visited his grandparents on weekends once or twice per month. Robert saw his cousins and his uncles Joseph, Frank and Charles at the Tenafly house. He saw Charles' two children there without Charles from 1964 through 1973.

The Tenafly home had a main level with four bedrooms, as well as a bedroom in the basement. He has memories of Prudencio and Carolina on the back patio and of Carolina working in the garden. In the late 1960's, Prudencio sat in a living room chair or at the dining room table and walked with a cane with some assistance.

While they resided in Norwood his father Anthony picked up Prudencio in Tenafly and took him to work at Goya in Brooklyn.

From approximately September, 1975 through March, 1976, Robert stayed at the Tenafly house. The house was still as he remembered it. It was filled with his grandparents' possessions, including clothes, furniture, statues, rosaries, shoes, and kitchen utensils.

Robert visited his grandparents twice in Puerto Rico—in 1968 at the time of the testimonial for Prudencio, and during the summer of 1974 for one or two weeks. Robert recalled that in 1974 Prudencio had to be in a chair most of the time and was dressed in a robe. He would use a walker but had to be assisted when he had to get in or out of a chair. Robert could understand some things Prudencio said through gestures and voice inflections. Pru-

dencio became frustrated when Robert could not understand him. Robert usually spoke English to Prudencio, and Prudencio understood him when he talked. Carolina could communicate effectively with Robert in English.

XII.

Anthony's daughter, Mary Ellen Unanue Yorio, born in 1955, is a nurse.

Mary Ellen recalls visiting her grandparents in their Tenafly home in and after 1962. She asked her mother in or about 1964, why her grandparents moved to a new house. She was told that they wanted a ranch style home so Prudencio could get around and that he had a "black leg." She remembers that Prudencio sat all the time.

Mary Ellen stayed with her grandparents for a short time at the Tenafly home during the summer of 1964 with her family. At that time Prudencio sat a lot and listened to the radio and television. Prudencio watched Spanish television. Mary Ellen does not remember if he also watched or listened to English broadcasts. The grounds of the Tenafly house were pretty and a gardener cut the grass. There was a basketball court in the driveway. During her visit in 1964 her cousins would visit on weekends. There was a blue hutch, which Prudencio did not like that had been placed in the basement. (This appears to be the armoire to which Prudencio objected.)

After Mary Ellen's family moved to Norwood in 1964, she saw Prudencio in the summer months. She was told by her mother that Prudencio went to Puerto Rico in the winter to avoid the cold and slippery conditions which made it difficult for him to get around. From 1969-1970, she would telephone her grandparents in Puerto Rico and they would tell her that they would be back soon.

Until some time in November, 1970, her father, Anthony, took Prudencio to work at Goya.

After November, 1970, when Prudencio was no longer in Tenafly, Mary Ellen would telephone her grandparents and ask them when they were coming home. They said they could not return because Prudencio could not get on or be on a plane for a period of time and that he could not walk well.

Mary Ellen and her father visited Prudencio in Puerto Rico during the early part of winter in 1972. At that time Prudencio was unable to speak or be understood. He was in a wheelchair, was catheterized, and had a blanket over his legs.

Mary Ellen spoke to Carolina in Spanish and English. Carolina was not completely fluent in English.

She never saw Prudencio again after the winter of 1972. However, she spoke to her aunt and her grandmother by telephone and was told that they would come home when Prudencio was better and able to get on a plane.

Her grandparents' Puerto Rican apartment had a living room and three bedrooms. She does not recall seeing any family pictures, such as those in the Tenafly house, in that apartment. The "radio with all the bands"—apparently a short wave radio that was in Tenafly—was not there either.

In 1975, Mary Ellen's father, Anthony, became ill and in September or October of that year her family moved to her grandparents' Tenafly home. Mary Ellen, who was approximately 20 years old at that time, recalled that the house was the same as before: clothes, shoes, and veils for church, were in drawers and closets; Carolina's oil painting equipment and Prudencio's canes were in a closet; a picture of Frank was in Carolina's drawer, and there were religious statutes and knitting paraphrenalia in the house. The short-wave radio was also there. Mary Ellen stated that before they moved into the Tenafly house her uncle Joseph told her that there was a

break in and that pillowcases, silverware, and jewelry were missing from the house.

XIII.

Mary Louise Unanue Guggenheim, Joseph's daughter, an M.D., moved to Bogota with her parents from Puerto Rico in approximately 1964.[1] She remembers Prudencio and Carolina in their Tenafly home between 1966 and 1967. She and her parents visited there every Sunday, except during the winter.

She spoke Spanish to her grandmother unless a neighbor's child was present. Her grandparents also spoke English. She played in a large backyard with trees. The house was well decorated. It had a large basement, with a guest room, bathroom, kitchen and laundry. Prudencio would "kid" with the children. He had difficulty walking; he always used a cane. Carolina gardened around the outside of the house. Ana Maria, her great aunt, knitted and crocheted.

After November 1970, the house remained the same, except during the period that repairs were required after a pipe exploded. Prudencio, Carolina and Ana Maria had all of their clothes and shoes in the house. Ana Maria's crocheting was still there.

In August or September, 1975, she and her mother stocked the refrigerator with food and checked the house in anticipation of Anthony's family moving into the Tenafly house.

After November 1970 she spoke to Carolina and Prudencio by telephone. She also visited Puerto Rico once a year. Carolina said Prudencio was ill; that they would return soon when Prudencio was better; and that she would not travel without him.

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[1] This date apparently is incorrect. It should be 1962.

In April 1974 she and her parents attended Prudencio's birthday party in Puerto Rico. She spoke to Prudencio about school. Although Prudencio spoke in little phrases and had difficulty speaking, Cristobal Colon was there. He understood Prudencio better than anyone else. Prudencio understood what was said to him and what went on around him.

In February 1976, they visited Prudencio. He was very sick and dying. Carolina told them to talk to him about Goya, as it would make him happy. He had a catheter on covered by a towel.

After Prudencio died Carolina lost her will to live, was very depressed and stopped talking or eating.

During her testimony, a letter from Bogota dated June 21, 1962, written by Carolina to Prudencio's sister and brother, Jesusa and Paco in Sain, was introduced in evidence. Mary Louise received it from Jesusa. It refers to the "hectic activity of moving"; that this is a "complicated move, since we have to leave everything in order for Carmen Ana [Joseph's wife] who expects to be here with the whole family the 27th"; and that Frank who resided in his own home [in Demarest] "comes by everyday to pick up and bring back Prudencio . . . When we move [to Tenafly], we will be closer to them." It further states that "next year we will see each other . . .; because its true only there [in Spain] does Prudencio rest from his business."

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION—BERGEN COUNTY
PROBATE PART

Docket No. M-128817

In the Matter of the Settlement of the Accounts of JOSEPH UNANUE and FRANK UNANUE, Trustees under the Trust Agreement dated November 16, 1970, as amended by and among PRUDENCIO UNANUE, as Grantor, and JOSEPH UNANUE and ANTHONY UNANUE, as Trustees of Sixteen Trusts thereunder

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TRANSCRIPT OF PROCEEDINGS

November 19, 1993
Hackensack, New Jersey

BEFORE:

THE HONORABLE ARTHUR J. LESEMANN, J.S.C.

* * * *

[2] (2:05 P.M.)

THE COURT: All right. We have the various aspects of the matter of the settlement of the accounts of Joseph and Frank Unanue as trustees, and various requests which I'm not going to try to summarize right here, including cross motions filed by Mr. Charles Unanue.

Let me begin, please, with the appearance of counsel and any pro se parties, please.

MR. GRIFFINGER: Michael R. Griffinger, Crummy, Del Deo, Dolan, Griffinger and Vecchione, for the beneficiaries.

MR. QUIRK: Patrick Quirk for the trustees.

MR. DURKIN: Martin T. Durkin, Guardian ad Litem for Jorje Unanue.

MR. SATZ: David Satz, Saiber, Schlesinger, Satz and Goldstein, for Goya Foods, Inc., the Intervenor.

MR. CHARLES UNANUE: Charles Unanue, Pro Se.

THE COURT: Okay. I guess the most approriate way to begin is with Mr. Griffinger, and why don't you start, and we'll hear what the other people on your side of the room want to say, then we'll hear anything that Mr. Charles Unanue wants to say.

MR. GRIFFINGER: Thank you, your Honor.

Your Honor, we have brought this matter on for dispositive hearing with respect to the remaining issues. And your Honor is familiar because of the voluminous papers that have been [3] submitted, including the 147 page opinion that Judge Kole has written in this case in which he has recited many of his fact findings regarding the history of the case.

This case started before your Honor more than six years ago and in December of 1987 your Honor took exlusive jurisdiction over the trusts and the estates and found that this was the appropriate tribunal for the adjudication of not only the accountings but the rights claimed by Charles Unanue in the trust and the estates of Prudencio Unanue.

Since that time we've had a lot of activity in extensive hearing before Judge Kole which has made it clear that Prudencio Unanue was a New Jersey domiciliary. The threshold issue your Honor set out for us in December of 1987 is something that you viewed as an initial determination that would go a long way in resolving the disputes.

And so today we have before your Honor a trust, because the estate has been wrapped up, a trust being administered under New Jersey law, settled by a New Jersey settlor with assets in New Jersey, and underlying property, i.e., the company in which the stock has stockhold-

ings in New Jersey. We have all of the elements that point to the propriety of applying New Jersey law and that's what we seek application of in this case.

Judge Kole found that Prudencio's domicile was not only in New Jersey on the two operative dates in 1970 and 1976, but at Page 104 of his opinion, that Prudencio's domicile was always [4] in New Jersey; at Page 98, that prior to and in 1970 it was in New Jersey; and in fact, he found at Page 69 that once Prudencio left Puerto Rico to go to the United States, he considered his place of residence in the U.S. as his home.

Prudencio and Carolina, as your Honor knows, came here in the early 1920's and established their home, first in New York and then in New Jersey. So the question now before the Court is whether or not there is any claim that Charles Unanue can now assert to the assets in the trust, that I believe and assert and allege and advocate belong to the beneficiaries.

The trust which has been in existence since 1970 and administered, as your Honor pointed out on December 7th, 1987, administered in this jurisdiction for many years since 1970, that trust has now ripened. All but one of the beneficiaries are entitled either by right or in the discretion of the trustees to receive the assets, the stock.

The domicile having been determined, the only issue is whether the accounting is proper and whether we can now make the distribution to the beneficiaries. Mr. Quirk will deal with the accounting aspects since he is representing the trustees and has filed the accounting on their behalf.

Since New Jersey law governs, your Honor, I believe it's clear that Charles Unanue's claims, as expressed in his early pleadings, that the forced heir, the forced heirship regime of Puerto Rico is not applicable; rather, the probate law of New [5] Jersey is applicable.

And so we get down to what I believe is one and only one remaining contention that Charles Unanue has put before the Court as a matter of law and that is

whether or not there was any community property interest fo Prudencio's wife, Carolina in the property that is now in the trust and whether directly or indirectly Charles may assert a claim to some portion of that.

I think our briefs are clear on the subject. Their community property is a concept that is foreign, of course, to the State of New Jersey. We know that it is, in fact, a concept that is in effect in certain states in this country and in Puerto Rico.

But Charles' contention is that because Prudencio and Carolina were married in 1921 in Puerto Rico, that that community property regime attaches to their marriage and the property not only that they had at that time, but that they may ever acquire thereafter in perpetuity as I read his contention. That is not the law and that is not logic.

First of all, the law as we understand it and have briefed it is that the law governing ownership rights in property in a marital situation is governed by the location, the domicile and the law applicable to the domicile at the time of acquisition.

Goya Foods was not in existence when Prudencio and Carolina were married in 1921. In fact, Goya Foods, Inc. was [6] incorporated as Unanue and Sons in 1946. That's 17 years after Prudencio came to the New York/New Jersey area or 24 years after he came to the New York/New Jersey area and 17 years after he moved to New Jersey.

It was incorporated, as I say, in 1946. Even certain predecessor businesses were not even in existence for more than a few years before the incorporation of Unanue and Sons, now known as Goya Foods, Inc. So Prudencio could not and did not acquire any property interest in the trust assets to wit the snares of Goya Foods prior to its creation.

His domicile at that time was New Jersey and therefore the law of the state of the domicile at that time controls. We don't have a community property regime. Goya Food's stock was movables or personalty and that's

governed by the domicile at the time of acquisition. And I think the law is clear and Charles Unanue has cited—neither Charles nor Mr. Brody have cited to any authority to the contrary.

Even if one would assume, arguendo, that Puerto Rico was the domicile of Prudencio and Carolina at some point in time—and that's not at all clear because as your Honor wil recall from a recitation of the facts, when Prudencio got married, his mariage certificate said he was a resident of New York. So it's not even clear that as alleged, that he was a domiciliary of Puerto Rico back in 1921.

But even if that's the case, a change of domicile, as the [7] authorities we have cited show, indicate that nonetheless there is no persistence to the law regarding property ownership from the date of marriage forward if you change your domicile.

It's logical, if a couple moves from a community property location to New Jersey, they don't carry with them—except perhaps with respect to the assets that they had at that time—they don't carry with them the law of Texas or Louisiana or California or in his case Puerto Rico.

On the contrary, with respect to property acquired in the new domicile, it is governed by that law. And I think even the Puerto Rican law that we have looked at and briefed for your Honor in the *Toppel* case, makes it clear that they will honor the time of acquisition rule, and that even if that is not totally dispositive, that the locus with the most significant contacts to the relationship of spouse to spouse is what governs.

And in *Toppel* the factors cited, paramount was the state of domicile at the time of acquisition of the asset. So under that rule, even Puerto Rico's law, which looks at the community property regime—I won't go through the other factors in *Toppel* but it's clear, where you raise your children, where you live, where your social and business ties are, that those are the significant contacts.

So even under that stretch of a test, which we don't believe the Court even has to reach, it is clear that the [8] domicile controls the property interest.

What happened here? Prudencio had the stock in his own name. He did not have it in his joint name with his wife, but rather he had 53 shares at the time he created the trust in the name of Prudencio Unanue. He put them in the trust, those assets which he had acquired while he was domiciled in New Jersey, and in placing them in the trust, he was governed by New Jersey law.

The beneficiaries, your Honor, many were in New Jersey, all the contacts point to New Jersey. I respectfully submit that the contention of the community property interest in Carolina attaches is without merit. Moreover, Carolina lived 'till 1984; Prudencio passed away in 1976. There was never an assertion between 1976 and 1984 on behalf of Carolina of any community property interest.

And as I understand it, community property laws are to protect the spouse and that is if there was protection needed, that is when it could have been—

THE COURT: Let me ask you something that puzzled me somewhat. There was no assertion on your side that the very—at least I didn't see it—that the very broad release provisions in the 1974 agreement did not bar the present attack that you just described.

When I first read that Mr. Unanue was claiming or was attacking the validity of the trust because of the community [9] property—and I'll use that term as an oversimplification—my first reaction was to expect that the claim would be he can't do that because the 1974 agreements with the extraordinarily broad and all inclusive release provisions and covenants not to contest disposition of property by Prudencio, I would have thought you would argue would bar such an attack, i.e., just as you say Charles Unanue cannot directly claim an interest in the estates because of that provision, I had expected you to say "well, he can't do it in the 'roundabout way of claiming that interest through his mother's estate", but I didn't see that argument and I was curious why not.

MR. GRIFFINGER: If it did not leap off the page at your Honor, I submit, respectfully, that it is made when we say that in the 1974 amendment Charles entered into a number of covenants which we claim he has breached by these very lawsuits. They are a covenant contained in Article 6.02, 03, 04 and 08 which are in our papers, but summarized briefly those provisions say—

THE COURT: Well, you don't have to go through that. I know I have them right in front of me now. They're extraordinarily, as I say, all encompassing and they are filled with such language as: At any time, or in any way, or in any method, and all interests by virtue of any relationship or other operation of law or otherwise.

MR. GRIFFINGER: Yes.

[10] THE COURT: It seems just as broad as the English language could make them, which is why perhaps your answer is that it was implicit in your argument. I thought when you addressed that, that almost would have been Point One before we got into the niceties of choice of law or anything else.

MR. GRIFFINGER: Well, we felt that we did want to make two points; one, that under trust and estate law, even absent the contract, that Charles has no claim to any assets of the estate or trust because Prudencio is a New Jersey domiciliary, everything relates to New Jersey, and his only claim is under a Puerto Rican law concept of conjugal property or community property, so as a matter of law he fails on that particular.

The second point, and the second point is exactly what you raise and that is our contention and our request that your Honor declare that the 1972 contract as amended in 1974 is valid and enforceable and that Charles has breached it by these very lawsuits.

And those covenants are very broad. They are contained in the four paragraphs that I mentioned and they include words like indirect or direct as well, and this is a violation, this is an attack, a contest of the disposition of the property of Prudencio. It is an interference with

the disposition. It is a breach of the covenant not to sue, all of which are enforceable covenants.

[11] So we rely, yes, on those provisions, but we suggest as a matter of law, under trust and estate law, that there is no claim that Charles can assert. And so if we do not make that clear in our brief, it is certainly our point.

And that, of course, brings us—and I'll be very brief with respect to the contract issues.

As your Honor knows, these contracts were executed many years ago. They provided that New York law governs. They were negotiated in New York. They were litigated in New York and they were settled in New York. And in the Federal Court in New York a stipulation was entered agreeing to this settlement and attaching it to the stipulation.

All of those contacts made it clear that New York was a proper state with a sufficient interest for the parties to specify that New York law governs. New York law having governed, the contracts were carried out.

Charles Unanue received all of the funds under the contract by 1975 aggregating 4.3 million dollars. He received the full benefit—and he never challenged these contracts thereafter until this litigation.

Now, he seeks to nullify them completely, to go back to the status quo ante before these contracts were executed. As your Honor knows from the papers, the contracts arose out of heavy litigation that began in 1969 and ended in 1974 in that round. Charles was well represented. He participated.

[12] If your Honor has reviewed these agreements, you'll see he initialed the pages of the agreements. His initials appear. Charles is, by his own self-statement, a sophisticated businessman. He was chief executive officer. He was the prime mover, according to Charles, in having Goya grow into the success that it became before his departure, so he is no babe in the woods.

When these contracts were negotiated, he had plenty of legal assistance and plenty of accounting assistance and he took his money, and even as of the signing of the agreement, he had already put in his pocket close to two million dollars. And the pay out thereafter concluded it, the 4.3 pay out.

What does he say in order to challenge these agreements? In order to pervent what your Honor has just pointed out, i.e., covenants that he would never do what he's been doing for the last six years to the trustees, the company and my clients, the beneficiaries, he says: Well, I was defrauded. Broad brush. I was defrauded, No particularity. No representations. No statements upon which he relied to his detriment that are shown to be false. All the classic elements of fraud are missing.

What else does he say? He says: Well, there was this fictional domicile conspiracy, and as a result of that fictional domicile conspiracy, my father was a domiciliary of Puerto Rico. Judge Kole expressly rejected that in ruling that Prudencio was a domiciliary of New Jersey and in fact he [13] expressly rejected the fictional domicile conspiracy at the bottom of Page 76 of his opinion. So that claim is out. We're left with this rather amorphous claim that somehow I was either defrauded or under economic duress when I entered into these agreements and your Honor shouldn't permit them to be enforced.

We can't discern from his complaint anything other than a general statement that I wasn't told about how the company was defrauding I.R.S. or they tried to defraud me "as a future heir of Prudencio and Carolina". That sort of things. And the waiver, he says my waiver of inheritance is invalid under Puerto Rican law. We know that that is not the case under New Jersey law.

And finally, he says I was economically defenseless. These are the words he uses in his counterclaim to the Goya intervention complaint. Judge, he's claiming fraud going back to 1969 or 1970 or 1974 at the latest. He

had discovery in that litigation. He had attorneys, he had accounts, and yet he is unable to articulate anything other than a generalized statement of fraud.

And this Court, I think, need not countenance that in light of the facts that are set forth in the Judge Kole opinion and elsewhere. He took the fruits, the 4.3 million, it's time that we should put an end to this claim that these contracts in some way are unenforceable and he has failed to plead a claim that can withstand the test of scrutiny by this Court.

[14] Finally, with respect to his illegality claim which he challenges the contracts with, he says: well, the waiver clause, my waiver of inheritance is invalid and therefore the whole contract must fall. Well, that's not true for several reasons. First of all, the waiver inheritance clause is valid under both New York law, which is the law governing the contract as specified, and under New Jersey law to the extent that the policy of New Jersey is concerned. So the illegality claim that a waiver of inheritance clause vitiates the contract is without merit.

Secondly, we know that Prudencio Unanue skipped all four sons in his estate planning. He gave his shares of stock to his grandchildren. Other than a modest amount to his wife, the four boys did not figure in the Will. Only their children, i.e., Prudencio's grandchildren. That's a freedom of testamentary disposition that this State honors, and the fact that Mr. Unanue thinks that there is some bar against waiving your inheritance or having a right in the estate, is wrong. He has no rights. He has no inheritance rights. Prudencio left him nothing and, therefore, even if the waiver is not valid, he waived rights that he didn't have in the sense that he had no right to inherit under New Jersey law from his father.

And finally, that inheritance waiver is severable, even if your Honor has for some reason some concern about it, it is severable and it does not undermine the rest of the contract.

[15] But we think it is valid, enforceable, correct under New Jersey law and that Charles has no right to say "throw the whole contract out" because of this clause. He also claims that the contract is invalid because of economic duress—I'm sorry—he says the attoney's fees clause is invalid and, therefore, that vitiates the contract.

Once again, while we are not asking for our attorney fees today because, first, we have to be a "prevailing party" under the contract and we don't presume to say that we have done that yet. We do reserve for a later date our request for the counsel fees specified, either singlely or doublely under the contract.

His last claim, economic duress, he says: I was unable to function economically in 1972 and 1974. And I think there are several answers to that. We put exhibits before the Court, before Judge Kole in the hearing that showed he had received in January of 1972, started getting payments under the buy-out arrangements which continued through April and June when the contract was signed, he received over $350,000 by then.

In September of that year he started receiving payments. By March of 1974, which pre-dated the 1974 amendment, he had received over a million dollars in principal and interest. So for him to claim that I signed that 1974 agreement and the Court should set it aside because I was under economic duress, is outrageous.

[16] Your Honor, in addition to that, if he didn't know in 1974 when he signed the contract, or in 1975 when he received the balance of his 4.3 million dollars that he was under economic duress, I don't know why he knows it now. So he's a little late. I think it's clear that he has waived any such claim at this point in time and I believe we cited authorities to that.

Your Honor, the beneficiaries have waited very patiently through extensive proceedings, not only in this Court but also through the bankruptcy proceeding that Charles Unanue filed, which has been characterized by the First Circuit and by the United States District Court

ror the District of Puerto Rico in opinions that we have forwarded to your Honor, as a sham and as a manipulation of the judicial system. And the time has come for the beneficiaries—all of whom except for one are of age—to receive the fruits of the bounty that Prudencio set aside for them some 23 years ago.

Thank you.

THE COURT: Thank you.

Mr. Quirk, are you going to—

MR. QUIRK: Yes.

THE COURT: I think I'd just as soon hear from this side, from Mr. Griffinger and his allies, and then, if it's satisfactory, to Charles Unanue, hear what he says.

Is that all right, Mr. Unanue?

MR. CHARLES UNANUE: Perfectly all right.

[17] THE COURT: Okay, fine.

Mr. Quirk.

MR. QUIRK: If the Court please, the determination by Judge Kole that Prudencio Unanue was a domicile of New Jersey I think unravels the rest of the case. I think that we are now in a posture that the remaining issues can be determined. And I think that the remaining issues can be determined because of the basic facts of the case.

When we stop and think and take into consideration that this is an attack on a trust which was an *inter vivos* trust which was established and funded in 1976, and when we also take into consideration that the attack upon the estate is an estate of a decedent who died in 1976, if we take into consideration that both the trust and the estate were administered in the State of New Jersey in the normal course, and that the estate, for instance, was probated in New Jersey, there was publication and notification to 18 of the grandchildren, two of which were Charles' own sons, and that it proceeded in the normal event and that in 1986 we also filed an accounting for the trust and that also received the normal notice for the 18 grandchildren, two of which again were Charles' sons, that when we take these into consideration, in addition to the fact that in

1974 Charles signed the contract of which he alleged that he would never file any claims against his father's estate, and that when we take this all into consideration, that Charles really [18] has no claim against the estate and he should not be heard to discuss it.

The first time he ever made a claim is in 1987, and at that time taking into consideration that the—we're talking about a trust in 1970, and he makes this first claim in 1987, it's incredible for him to make any claims against the estate.

Charles is a stranger to the trust for all practical purposes. I take a very simplistic approach to the estate and the trust in that I don't think that we should even discuss Puerto Rican law because Puerto Rican law has no bearing.

It's not even something we should even be discussing because Judge Kole has determined that since 1929 and onward Prudencio was a domicile of the State of New Jersey, and as a domicile of the State of New Jersey, he had complete authority to do with his estate as he saw fit, and Puerto Rican law has no influence over that, and I'm sure that this Court would have come across many other situations where someone whose immigrated from Puerto Rico or some other state which has the community property law, that there would have been similar claims that Charles has made.

THE COURT: There have been no objections to the accounting other than those dealing or submitted by Mr. Charles Unanue.

MR. QUIRK: There have been no objections filed in accordance with the Rules.

[19] THE COURT: One other question. The latest supplemental submission that was brought in in October, that covered the period through June 30, 1993. Am I correct on that?

MR. QUIRK: Yes, June 30th, 1993, your Honor.

THE COURT: Okay. Thank you.

MR. QUIRK: That's all.

THE COURT: Mr. Durkin.

MR. DURKIN: Your Honor, I join in the same sentiments expressed by Mr. Griffinger and Mr. Quirk. The length of these proceedings can be seen, in the case of my client, he was a junior in high school when these proceedings started and he's about to graduate from college,

THE COURT: So was I.

MR. DURKIN: He's about to graduate from college in January of 1994. I think it's time to put an end to these proceedings. I think the whole purpose of these proceedings has been an attempt by Charles to manipulate the judicial processes in several various jurisdictions and I think we ought to end it as expeditiously as possible.

In my own case, I filed a report previously with the Court when it approved the accounting. I do not feel it's necessary to file a report at this time. I make no application for counsel fees. I would ask to be discharged if this Court sees fit to approve the accounting and make a final determination in [20] this matter, subject to one caveat, of course, if there is an appeal I don't want to have Mr. Charles Unanue beating up on me in the appeal and not knowing about it, so as far as I'm concerned, this case should be ended as quickly as possible.

THE COURT: Mr. Satz.

MR. SATZ: Your Honor, I appear on behalf of Goya Foods, Inc. If you recall, we came in as an intervenor under the entire controversy rule which at that time was in somewhat of a state of flux, but clearly now it applies to our posiiton as we had advocated because of the effect on the corporation of Charles' attack, various attacks which brought into line what he had promised to do in the 1974 amendment to the 1972 agreement.

And I think your Honor alluded before to Section 602, three and four and Section 608 among other sections of the 1974 amendment to the 1972 agreement which clearly established that in addition to 4.3 million dollars back in 1974, reduced only because of the method of payments from 4.5 million, Charles agreed to forego not

only attacking the corporation in the future through litigation or by other means, but also foregoing his rights to the estate, any inheritance by direct or indirect means.

When we brought this action, Charles filed a counterclaim attacking certain—attempting to attack certain corporate acts which, of course, were answered by the corporation. And [21] to this day—and while we're in court not only seeking a declaratory ruling with respect to the validity of the two agreements to which he was a party, but also to have a dismissal entered against his counterclaim. And that isn't clear as to what finally became a counterclaim through some of his counsel's own explanations of what he was saying because the counterclaim in a sense was a mirror of what he had filed in a Puerto Rican state action.

But the bottom line is that the law is clear with regard to the validity of the contracts that he entered into, the agreements, they're presumptively valid, the New Jersey law is completely in accord with the terms that he claims are invalid, and that it's simply a situation where he keeps going on and on and on thinking of new ideas reflected by advice from time to time by various attorneys whom he's employed just to stretch this on.

But the fact of the matter is that these provisions of the agreement that we're seeking to be upheld and enforced today are very simple, very direct, there are no angles to them. And he has not told the Court or the parties why they're not enforceable except through generalities that he claims that there was fraud and duress and other defenses that usually are implied when a complaint is filed against someone.

But what we come right down to is that these agreements were designed to do one thing at that time, and that was to [22] settle the differences back in 1972, and then refined in 1974, that have created three or four years of litigation already in New York, in Delaware and so on, and I thought everybody at that point, or it would seem that everybody at that point with the consideration that

was paid would lick their wounds and go away but, no, because he found this magic Puerto Rican statute that he's claiming of forced heirship rights, so many years later he comes back with a whole revision and revulsion of what he had originally brought up against the corporation.

And to that extent, we have defied Mr. Unanue to come forward with what he had in his complaint. He has not done so. There is no fraud. He hasn't proved fraud. He hasn't proved anything. He just keeps coming forward with generalities.

And we say again, like has been said by my three colleagues, it's time to put an end to these general claims that he is making and move on. Because of the effect not only upon the estate, the trustees, the beneficiaries, but also on the corporation, because while the corporation has gone on and been successful, it's still a burden, monetarily and otherwise, to have this litigation continue the way it has here and in Puerto Rico.

It has been a drain economically. It has impeded plans on corporate development to the extent that they might want to do something. He has continually challenged the ownership so that no one can do anything. He has alienated ownership through the [23] trustees or through the Board of Directors. And I state again and urge the Court that the provisions of the two agreements, the amendment to the '74 amendment and the basic agreement itself be declared valid and enforceable and that his counterclaims against Goya be dismissed.

THE COURT: Thank you.

Mr. Unanue, I guess it's your turn?

MR. CHARLES UNANUE: I feel honored following such eloquent speakers but I am not a speaker, but I do have some business experience. I would like to place on the record my objection to being required to appear pro se, saying that the Chapter Seven Trustee which was substituted as the real party in interest, is not here to protect the interests of the estate and the Court has refused my

request to wait until my motion to remove the trustee and have a new one appointed is decided.

Furthermore, my ability to retain a lawyer with funds from my wife has been inhibited by the freezing of all our real property, whereever located, by plaintiffs. My wife's assets are hers as we maintain. They should not have been frozen and she would be free to pay for my lawyer.

If, as plaintiffs allege, her assets are mine, I would be free to retain a lawyer, but instead there is a freeze. The effect of which prevent the use of these assets to retain a lawyer, although in either event I would be able to do so.

While it is true that Mr. Brody has been paid by my wife to [24] represent me in certain bankruptcy proceedings, my wife was unable to retain him to re-enter this case, with the prospect that litigation and appeals may be extremely costly and as they have been to date, and may take years because of the freeze on her major assets.

As a result, I was forced to patch together a brief that really was a combination of previous briefs in the Puerto Rico proceedings, without the benefit of a lawyer researching all of the cases that may be in my favor, and writing it, and I am therefore at an unfair disadvantage because at 71 years of age and without a legal education, I am not competent to find cases that would help me write an effective brief and effectively argue before you the issues of personal inheritance and personal stock ownership matters here against some of the largest law firs in New Jersey which are being advised by Skadden, Arps, one of the largest law firms in the country, all of which are being paid by the relatively unlimited funds of the Goya Companies, one of which, Goya Foods, Inc. has intervened in this personal inheritance matter without visible benefit to its corporate interests but in support of the personal interests of its controlling stockholders.

With respect to my mother's estate, I filed an action to inherit from my mother in Puerto Rico on September 1, 1987. This Court in its opinion and order of December 7, 1987 at Pages 13 atnd 14 of the transcript stated that

nothing in its [25] order refers to my mother's estate and that I was free to pursue my inheritance of my mother in Puerto Rico, as I had done, or in any other jurisdiction.

However, plaintiffs are now, in effect, and without advising your Honor of your prior decision, seeking to bar me from having the Puerto Rico court decide this issue. All I want this Court to do now is to defer to the decision of my right to inherit from my mother and of what I am entitled to inherit from her estate to the courts in Puerto Rico.

The reasons that the Court should do this are: My mother was a domiciliary of Puerto Rico from the time of her second or third arrival in Puerto Rico in 1906 to the date of her death in 1984. I realize that plaintiffs dispute that fact but if necessary I am prepared to state all the facts that support that statement, including statements made to me by my mother about her persistent intention to always return to Puerto Rico ever since she left there in 1924 and the fact that she never attempted to learn English and only spoke Spanish.

My mother resumed living in Puerto Rico from four to seven months each and every year from 1949 to 1970, generally staying longer during the later years, and after 1970 she never again left the island of Puerto Rico until her death 14 years later.

The domicile of my mother, was not decided by Judge Kole.

My mother was a citizen of Puerto Rico at least from 1971, a year after she moved to Puerto Rico for the last time, until [26] the date that she died, pursuant to 48 USCS 733a. That cannot be disputed as a fact.

It is undisputed and admitted by the plaintiffs that my mother was a domiciliary of Puerto Rico on the date of her death in Puerto Rico, and also undisputed that I was and am a citizen and domiciliary of Puerto Rico, therefore, Puerto Rico has a paramount interest in deciding the issues relating to my inheritance from a widow who was a resident, citizen and domiciliary of the Commonwealth of Puerto Rico.

I will digree to say that Puerto Rico, unlike the state, cannot make its own laws and is governed by the laws passed by the Congress of the United States.

Puerto Rico has an interest in insuring that widows that are citizens and domiciliaries receive what they are entitled to. Furthermore, this Court has no experience in interpreting and applying the law and case laws of Spain and Puerto Rico concerning conjugal partnerships as distinct from community property which are mostly in the Spanish language.

Therefore, since I did not seek in my counterclaim before this Court my inheritance from my mother, and your Honor specifically directed that I was free to pursue this claim in Puerto Rico, I ask you to defer this issue to the courts of Puerto Rico and to restrain the trustees of the *inter vivos* trust from distributing the trust until my inheritance from my mother is decided. Later on I will say why they are not being [27] damaged by that.

If you refuse to refer this issue, then you must—you first should consider the following facts:

One, both my parents were citizens of Spain and residents of Puerto Rico when they were married in Puerto Rico and when I was born and baptised on September 21, 1922 in Puerto Rico

My parents did not move to New York until 1924 and always had the intention of and commitment of returning to Puerto Rico where they both had grown up and where they had real property, to rejoin their family and friends as soon as economically possible.

Although Judge Kole found that my father was domiciled in New Jersey on November 16, 1970 and on March 17, 1976, he did not make a determination as to his domicile before 1970 and he made no determination of the domicile of my mother at any time.

My father filed for bankruptcy in 1936.

The Goya Company's business was originally commenced by my father in 1936 after he had filed bankruptcy with private funds which my mother had inherited

from her family in Puerto Rico and funds belonging to their conjugal partnership resutling from my mother's share of rental income from Finca Carolina, a large farm in Puerto Rico.

My father did not become a naturalized citizen of the United States until 1946, and my mother became a naturalized citizen of the United States in 1956. Therefore, the business [28] now known as Goya Foods, Inc. was first acquired in 1936 when both my father and my mother were citizens of Spain and subject to their laws. The change in the form of ownership from a proprietorship to a corporation in 1946 did not alter the fact that the asset which formed the capital of the corporation was acquired by Spanish citizens who were married in Puerto Rico

It is undisputed that my mother did not consent to the transfer of 53 shares of Class A common stock of Goya Foods, Inc. representing control over all of the Goya Companies, that had been issued in the name of my father, to the *inter vivos* trust nor to the disposition of these shares.

The *inter vivos* trust was revocable so that my father's interest in the stock was part of my father's estate.

My mother was a citizen and domiciliary of Puerto Rico on the day that she died.

Although Judge Kole found that my father was a domiciliary of New Jersey on the day that he died, he was a citizen of Puerto Rico at least from 1971 on, pursuant to 48 USCA 733a, which law was passed by the Congress of the United States in 1927.

Under Spanish and Puerto Rico law, my parents marriage created a conjugal partnership which is a juridical entity separate and apart from the spouses based upon the statutes of both Puerto Rico and Spain.

The statutes of Puerto Rico, by the way, were made by the [29] Congress of the United States or approved by them.

The conjugal partnership even has its own citizenship and domicile. The juridical entity is created by the codes.

It is governed by the partnership laws of Puerto Rico and Spain, regardless of change of nationality or domicile of the spouse and is the real party of interest and owner of their earnings during their marriage, wherever located.

In addition to the Puerto Rico and Spanish cases cited in my brief, the Federal District Court case of Fernandez-Cerra, et al versus Commercial Insurance Company of Newark, 344 Fed. Supp., 344 of 1972, outlines these principles. As stated in detail in my brief, pursuant to the laws of Spain, all marriages between Spanish citizens, without a pre-nuptial agreement, creates conjugal partnership.

Pursutant to the laws of Puerto Rico, all marriage that take place there, without a pre-nuptial agreement, also create a conjugal partnership.

I will read just two or three brief statements made by the U.S. District Court in deciding this particular case.

Husband and wife. In Puerto Rico, the community property is not the husbands but the conjugal partnerships in which the husband and wife have equal participation and which is only represented by the husbands.

The partnership is a separate and distinct entity from the partners and may appear in court represented by the husband as [30] administrator.

That's Stearhart versus Laskel (phonetic), 87 PRR. Melendez—I'm sure you have this—if citizenship of the partnership is to be considered, then the Puerto Rican citizenship of the wife would become material and the case would have to be dismissed for lack of diversity jurisdiction.

This was a diversity case.

It is well settled that when passing on the presence of diversity, of diversity jurisdiction, the Court must consider the citizenship of the real party in interest. The conjugal partnership. That the husband was chosen is the result of the traditional male chauvinism of the legislators which has become so well publicized in recent years by the resurgence of women's liberation or rather the women's liberation movement.

The legislature, though, made sure that when more important transactions were to be carried out, the wife's consent was required.

Last one.

In Guyarsa. (phonetic) Guyarsa is readily distinguishable from the present case because of the difference in the concept of community property in Texas and the Puerto Rican concept of conjugal partnerships.

Pursuant to the laws of both Spain and Puerto Rico, all assets acquired by the earnings of either spouse during the marriage, wherever they are, belong to the conjugal partnership [31] and at the time of death of one of the spouses, the survivor is entitled to have the equity of the conjugal partnership.

The plaintiffs do not dispute there this is the law of Spain and Puerto Rico. They do not dispute that the shares of Goya Foods were acquired with the assets of the proprietorship which preceded it, which assets were acquired while both of my parents were citizens of Spain.

However, the plaintiffs now wish to deprive my mother or her estate of what she was entitled to under Spanish and Puerto Rican law after 55 years of marriage.

Both Puerto Rico and New Jersey have public policies that support the receipt by widows of their fair share of the earnings of the marriage upon the death or divorce.

Puerto Rico expresses this policy in its conjugal property laws and New Jersey by its elective share awarded to widows. However, palintiffs seek to circumvent both these fundamental public policies.

The cases cited by plaintiffs in their brief deal only with community property, which is a joint tenancy and a different concept than the conjugal partnership which is a separate and distinct entity with a personality and nationality of its own and is not a joint tenancy.

In *Arbona versus Millares*, 102 PRR 463, the court ruled that a conjugal partnership was created in a marriage between Spanish citizens that was performed in New York without a [32] pre-nuptial agreement.

Therefore, the concept that plaintiffs rely upon—that is the interest of the spouses in a movable acquired by the other spouse during the marriage, which is determined by the local law of the state that the parties are domiciled in when the property was acquired, does not apply because the laws of partnership are the laws that are applicable.

For example, if Goya' shares were acquired by my parents trading as the Prudencio and Carolina Business Partnership, the laws of domicile of the partnership would govern, and since the business partnership was a Puerto Rican partnership, its laws would govern the property of the partnership. There is no case cited by the plaintiffs which addresses these issues.

In *Keyser versus Pilgrim*, 25 Texas Supp. 217 of 1860, the Texas Supreme Court recognized that the law of the first domicile governed the property even after the domicile changed.

Even the restatement of conflict of laws does not unilaterally apply the law of the domicile at the time of the acquisition. Instead, it suggests that the law of the jurisdiction that has the most significant relationship to the spouses and the movable be applied.

Under either test, domicile or significant relationship, there are facts that must be found, such as the original business—the original business was acquired when both my parents were citizens of Spain and I believe domiciliaries of [33] Puerto Rico.

Issues relating to their domicile in 1936 and when jurisdiction was most significant to them in 1936 and which jurisdiction was most significant to them in 1936, these were not litigated before Judge Kole. And if you find that either of these tests rather than the conjugal partnership laws of Puerto Rico or Spain apply, then I should be entitled to discover information in possession of the plaintiffs concerning their knowledge of the domicile of each of my parents in 1936, and the relationship between each of my parents and the business itself, and

Puerto Rico and Spain, so that I could present all the facts in my knowledge and the facts discovered from the plaintiffs to the Court for its consideration.

As your Honor will recall, discovery was previousy limited to the domicile of my father on only two dates, November 16, 1970 and when he signed his last will and created a revocable *inter vivos* trust, and on March 17, 1976 when he died. Any time that we ventured beyond this, any discovery was objected to and did not go on.

I had no interest in, and was prevented from discovering the facts about the domicile of my father and mother and their relationships with Puerto Rico and Spain in 1936.

Finally, as to my mother's interest in the res of the *inter vivos* trust, the case of *Toppel versus Toppel* does not apply because the Superior Court of Puerto Rico—excuse me, I think it's the Supreme Court—I have the Superior Court—[34] specifically found that the new principal of law does not apply to inheritance or succession cases. Even if it did apply, it would require the presentation of facts to meet the center of gravity test which requires first a determination of time, such as the center gravity when the asset was acquired, which would require a factual hearing for me to present my proofs, and after I discover the information known to plaintiffs and receive documents in their possession.

In addition, the underlying theme of the *Toppel* case is to provide for the wife, which is the public policy of both Puerto Rico and New Jersey, while plaintiffs in this case seek to deprive the widow of her estate, of her property.

In conclusion, I ask you to consider that the conjugal partnership of my parents is a concept of Spain and Puerto Rico law, derived from Germanic law to give equanimity to the wife which is a well settled law of Puerto Rico, Spain and other countries that have incorporated this principle of law to protect the wives, especially when their other laws required at that time that

the wife follow the husband and join him wherever he chose to live.

The Unanue family business, which was the foundation of the Goya Companies, was acquired in 1936 when my parents were Spanish citizens and subject to its laws. No discovery or trial has taken place to address the issues of the domicile of each of my parents in 1936, or the jurisdiction which has the [35] most significant relationships to them and to the business in 1936.

The public policy of both Puerto Rico and New Jersey favor a conclusion that my mother was entitled to a share of all the assets acquired by the spouses during the marriage.

Now the 1974 amendment.

THE COURT: Well, let me just ask you something before you get to that. The cross motion that you filed recently sought a declaratory judgment that the corpus was the property of the conjugal partnership. Had that issue been raised before you filed this cross motion? Is this the first time?

MR. CHARLES UNANUE: No, it was filed. My mother—the property—it was always maintained that the property of the trust was conjugal property.

THE COURT: When was that submitted here in New Jersey? Was that submitted in any of these proceedings?

MR. CHARLES UNANUE: It's in Puerto Rico. I don't know. My mother's case is not in New Jersey. It's only in Puerto Rico.

THE COURT: Hold it just a moment.

You just want to come up here on Zanca for just a minute, please.

(The Judge has a side bar discussion with another case)

All right, Mr. Unanue, go ahead.

MR. CHARLES UNANUE: Paintiffs do not dispute that [36] all of the clauses in the '74 amendment which provide for my waiver of my right to inherit from my

father, or which penalize me for attempting to seek such inheritance, violate the public policy of Puerto Rico where the 1974 amendment was signed.

They also do not dispute that the double attorney fee clause violates the public policies of both Puerto Rico and New York.

Since the choice of law provision calls for New York law to apply, and I maintain that Puerto Rico law should apply, the Court must determine under the restatement test, if it should refuse to apply New York law in order to protect the fundamental public policy of Puerto Rico.

In order to satisfy this test, since it is clear that provisions of the 1974 amendment violate fundamental public policies of Puerto Rico, the Court must determine if absent the choice of law provision, Puerto Rico law would apply, and in Puerto Rico has a materially greater interest than New York in the contract and the parties. This determination requires findings of fact.

I maintain that the following facts demonstrate that Puerto Rico law should apply and that Puerto Rico has a materially greater interest in the issues for the following reasons:

One, the 1974 amendment was signed in Puerto Rico. The decision to execute the 1974 amendment in Puerto Rico was not fortuitous. I wanted it signed in Puerto Rico for tax reasons [37] and because I was domiciled there.

My brothers wanted the agreement signed in Puerto Rico to further establish themselves as Puerto Rican domiciliaries and thereby qualify to receive tax free dividends from the Puerto Rico tax exempt companies as they have been doing since then.

My father and Frank also wanted the 1974 amendment signed in Puerto Rico because that is where they were living. In addition, that is where the escrow agent that received the shares in 1972 was located, there is where the promissory notes were to be held and where the payment were to be made.

Most of the payments to me were allocated to come from Puerto Rico companies. Plaintiffs allege in their brief that this was a mechanism to provide more tax free income for me. This is not true and represents a clear dispute of fact. The allocations were based strictly on the valuation of my respective interests in each company. This was not a tax avoidance scheme as alleged by the plaintiffs.

Although negotiations occurred in New York, I also participated in negotiations from Puerto Rico and my father and Frank participated in negotiations only from Puerto Rico. If Anthony participated, it was from Spain where he was living.

The parties to the agreement and the collateral covenants were myself, who resided in Puerto Rico; my father and my brother, Frank who also resided in Puerto Rico; my brother, Joseph who resided in New Jersey, but I believe was a [38] domiciliary of Puerto Rico, and Anthony who resided in Spain and I don't know where he was domiciled, seven companies were parties. These seven companies were based in Puerto Rico and were responsible for 77 percent of the monies that were paid to me or for my benefit, and four New York based companies were also parties that were responsible for just 23 percent of the monies that they paid.

The subject matter of the agreements was my sale of corporate stock and partnership interests in the Goya Companies to the Goya companies. All of my corporate stock, including the certificates of the New York corporations had been held by me in Puerto Rico and delivered by me in Puerto Rico to the Puerto Rico escrow agent when the '72 agreement was signed in Puerto Rico.

At that time I also transferred 1,278 Class B non-voting common shares of Goya Foods, Inc. to Caribbean Canneries, Inc. in Puerto Rico.

The complete performance of every aspect of the 1974 amendment, as well as the performance of the 1972 agreement took place in Puerto Rico. In fact, the place of

performance was specifically negotiated by the parties to be in Puerto Rico.

The foregoing, together with the violation of the public policies of Puerto Rico, clearly establish material significant interests of Puerto Rico .In addition, since I am a Puerto Rico domiciliary, Puerto Rico has a significant interest in [39] protecting me and insuring that I do not contract away rights granted to me by Puerto Rico law. In contrast, New York has very little interest in a 1974 amendment.

Goya Foods, Inc. was based in New York. Plaintiffs claim that it was a significant contracting party. They do not elaborate any facts to support their conclusion that it is or was significant. However, it was required to pay only 19 percent of the funds to be paid by the Goya Companies for my benefit, as compared with Puerto Rico Food Products Corp. and Caribbean Canneries, Inc., both Puerto Rico companies which were required to pay 77 percent.

THE COURT: Mr. Unanue, let me just interrupt. I'm trying to figure out how long—how we should proceed here.

Are you near the end?

MR. CHARLES UNANUE: I am—I think I have about twenty more minutes.

THE COURT: Well, we better take a break now then.

Okay. We'll take a break. Let's hold it to ten minutes. Take a ten minute break.

(Recess 3:17 P.M.)

[40] (3:27 P.M.)

THE COURT: Okay. Mr. Unanue, I'm really going to ask you to try and co-operate by keeping this down to the extent that you can. It's considerably longer than I had anticipated. We're getting quite late. You said twenty minutes, please try to hold it to that amount as a maximum.

MR. CHARLES UNANUE: I believe I will.

THE COURT: All right.

MR. CHARLES UNANUE: Goya Foods was based in New York. Plaintiffs claim that it was a significant contracting party. They do not elaborate any facts to support their conclusion that it is significant. However, it was required to pay only nineteen percent of the funds to be paid by the Goya Companies for my benefit, as compared with Puerto Rico Food Products Corporation and Caribbean Canneries, Inc., both Puerto Rican companies which were required to pay 77 percent. I would consider these last two, rather than Goya Foods to be the significant contracting parties.

Furthermore, in regard to the extent that Goya Foods, Inc. was based in New York, it moved out of New York in December, 1974, the same year that the 1974 amendment was signed. Since that time none of the parties to the 1974 amendment have been based in New York.

Plaintiffs contend that the '74 amendment settled litigation pending in the New York Federal District Court. [41] This is true. However, this is hardly significant or hardly significant contact since the subject matter of the litigation was the 1972 amendment—the 1974 amendment, excuse me--which also was intended to be performed in Puerto Rico by the same parties.

My father signed his Will and trust in an office in New York after making a trip from Puerto Rico for that specific purpose. However, both of these documents have a New Jersey choice of law provision. Therefore, the execution of these documents is not a significant contact, especially since they were not executed by a resident of New York.

Plaintiffs maintain that the stock certificates of Goya Foods were kept in New York. I am not sure which stock certificates they were referring to because Goya Foods, Inc. certificates which were sold pursuant to the '72 agreement as amended by the '74 amendment, had been given to the Puerto Rico escrow agent. If they are referring to the

certificates registered in the name of the trust, these certificates were physically moved to New Jersey in December, 1974.

Goya Foods is no longer a New York corporation and never was a New Jersey corporation.

Based on the foregoing, New York's interest in the 1974 amendment were tangential in nature in 1973 and do not exist at all day.

Finally, no court would countenance the use of a choice of [42] law clause to evade the public policy of the jurisdiction with most significant contacts to an agreement, such as Puerto Rico in this particular case.

If the provisions that violate the public policies of Puerto Rico and New York are stricken from the 1974 amendment, then the Court must determine, pursuant to the cancellation clause it contains, whether the 1972 agreement, as amended by the '74 amendment may not be substantially enforced.

This language is intentionally designed to be more restrictive than a normal savings clause in the sense that it contemplates a cancellation of the 1974 amendment as distinct from an effort to save it.

Furthermore, the waiver of my right to inherit from my father and other restraining clauses concerning future inheritance from others, which are clearly void under Puerto Rico law, go to the heart of the 1974 amendment. The amounts of my inheritance were very substantial. It was such a significant issue in the negotiations that my father and brothers insisted that the waivers and restrictions on future inheritance be included without consideration for me or from me and advised me that they would not sign the 1974 amendment without them.

This lack of consideration is another reason why the waiver is invalid as a matter of law. The double attorney fee clause is a similarly substantial and significant provision of the [43] 1974 amendment, so much so that the plaintiffs have relied upon it as the entire basis for their twenty million dollar Proofs of Claim against me in the

U.S. Bankruptcy Court for the District of Puerto Rico, and which claim formed the basis for the attachment of all of my wife's real estate.

Certainly the above provisions, which are contrary to the laws and public policies of Puerto Rico, are all substantial and central to the 1974 amendment. It would not be unfair or inequitable to declare the 1974 amendment invalid simply because I received the monetary payments. I have always maintained that if the 1974 amendment is declared void, the Goya Companies would be entitled to a credit for the payments made against the amount that I would be entitled to receive.

Both the 1972 agreement and the '74 amendment are void because of the duress that I was under when I signed it. These facts, the facts which support my claim of duress include:

One, I was fired summarily from all of my positions as President or Executive Vice-President of all the Goya Companies in June of 1969 and left entirely without income, severance pay or benefits of any kind, only because I objected to the massive tax evasion that I discovered was going on and tried to protect the Goya Companies by trying to stop it and correct it.

Two, the 1,250 Class B non-voting shares of Goya Foods, Inc. which had been issued to me were stolen by my brother, Joseph and destroyed as was later admitted by him in a sworn [44] document. A certificate for 28 Class B non-voting shares was left in their place.

I was subjected to intensive acrimonious litigation, partly to refute an agreement given me the option to sell my ownership in the Goya Companies to my brothers for one-quarter of average annual earnings plus one-quarter of book value. I was then persuaded to sign the 1972 agreement which would pay 4.5 million dollars with four percent interest over the next 15 years, but which had the important commitment to have a public sale in conformity with the provisions of the S.E.C., within the first two years, in which the equivalents of the shares that I

was selling to the Goya Companies would be offered for sale and I would reecive the money that was paid for the shares as soon as it was received.

Additionally, I would retain the option to repurchase 80 percent of the shares that I was selling at the price at which I had sold them. The additional requirement was that I would sign a transfer of the 1,250 Class B shares of Goya Foods, Inc. that Joseph had stolen, and transfer them from Caribbean Canneries, Inc. so that I would get just 25 percent of the value of the 1,250 shares in the public sale.

I soon learned that my brothers had no intention to fulfill their commitment to have the public sale, which would expose the tax evasion that allegedly had continued, and that the stolen 1,250 Class B shares that had surfaced only because [45] their issuance had been discovered in an inspection of the stock certificate records, would be unilaterally cancelled.

When I sent notices of default because of the cancellation of the 1,250 Class B shares, a lawsuit was filed in the New York Supreme Court by the plaintiffs asking for declaratory judgment that no default had taken place and therefore the acrimonious litigation was resumed for two more years.

The payments being received under the 1972 agreement were $240,000 per year plus four percent interest, most of which went to pay previous attorneys who had been on contingency and had obtained a judgment against me, and for the two law firms which were needed to defend against the Goya Company's legal attacks and to oppose them, to which legal firms—my legal firms I was already in debt. There was almost nothing left for anything else.

I was informed by my attorneys that the Goya Companies were prepared to continue and even increase the litigation "for as long as it takes" to have me capitulate, which I did about two weeks before the signing of the 1974 amendment on July 31, 1974.

Included in what I gave up in the 1974 amendment to the 1972 agreement was the surrender of my right to the

public sale of my shares, the right to repurchase 80 percent of the shares I was selling at the original selling price, the cancellation of the 1,250 Class B shares of Goya Foods that had been stolen, [46] my right to the future inheritance from my father, restrictions on any other shares that I may inherit in the future from others such as my mother, and the obligation to sell all other shares of the Goya Companies which I might otherwise obtain for the total sum of one dollar, and I also accepted a reduction of $200,000 in the installment payments.

The payments that I received as the result of the 1974 amendment make that clear because it's been stated or indicated that I received payments under both agreement and the amendment, I did, but whatever was paid under the 1972 agreement was deducted from the 4.3 million that was paid for my benefit by the 1974 amendment.

Of that 4.3, as we've gone into it in detail at the previous hearing, I netted just two million dollars which lasted for a few years.

To the extent that plaintiffs allege that I was not under duress, these are facts that are in dispute. Furthermore, to the extent that plaintiffs allege that the time of delay of my assertion of my claim of duress eliminates it, this is an issue of fact under which the Court must examine the reason for my delay.

My reasons for the delay in claiming duress earlier are as follows:

One, I had become fully aware of the surprising ruthlessness of my brothers and of the lawyers that they had [47] hired to represent them.

I was well aware of the huge resources of Goya Companies and the fact that they were totally under the control of my brothers, Joseph and Frank, who I believed were determined to keep for themseleves everything that I had worked for and developed from the family business.

Most important, I realized and have more recently been able to confirm that in addition to financial resources,

they have extensive political influence which they would not hesitate to use both directly or through the Goya Companies' attorneys and that any dispute would bring me back to where I was prior to the signing of the '74 agreement, pursuant to the cancellation cause in that agreement, and may further—there I may furthermore be obliged to return the money that had been paid for my benefit by the Goya Companies shortly after I signed the 1974 amendment.

Four, the double penalty clause was a further inhibiting factor until I learned that it may not be valid.

Finally, if your Honor grants the relief requested by plaintiffs. I request that you preserve the status quo and restrain the trustees from disturbing the trust res until my Puerto Rican inheritance case is completed and I have exhaused my right to appeal your Honor's decision at the conclusion of this case.

No decision should be made by this Court with respect to [48] the 1974 amendment because there are indispensable parties which have not been named by Goya Foods, that is the other parties and signatories to the 1974 amendment.

This Court cannot grant final relief for me or for Goya Foods, Inc. because the judgment would not be binding on the other signatories.

Conversely, all signatories to the '74 amendment are defendants to my complaints in the Puerto Rico courts.

Furthermore, I am informed that under 11 USCS, Section 362, no new complaints can be filed against me until my bankruptcy is concluded.

Plaintiff's motion before this Court asked for an order approving the second accounting of Joseph and Frank Unanue as trustees under the trust agreement on November 16, 1970. I oppose the approval of that accounting for the following reasons:

One, the distribution of the res of the revokable *inter vivos* trust established by my father and controlled by the trustees, who are my brothers, Joseph and Frank, is a

fraud on our mother because the res of the trust consists of what is now the principal asset of the estates of both our father and our mother, one-half of its value belonging to the estate of my father and one-half of its value to my mother's estate.

This asset had belonged, until the death of my father, to their conjugal partnership, a separate and distinct juridical [49] entity with a personality and nationality of its own.

The worth of this asset should be, and was when placed in the trust by my father who was its administrator, the fair market value of voting control over all the Goya Companies, which was its great intrinsic value. It also had the additional value of the book value of the stock, which was less than ten percent of the total value of that asset.

My mother neither authorized the placement of this asset in the trust nor of its distribution in any way other than as per the specific testamentary provisions of his last Will.

THE COURT: All right now, Mr. Unanue, we're just about at the end of your 20 minutes. I really think it's becoming repetitious.

MR. CHARLES UNANUE: I have—I have just two pages.

THE COURT: All right.

MR. CHARLES UNANUE: The trustees, hungry wolves guarding the chicken coop, defrauded the *inter vivos* trust which they had the fiduciary responsibility of protecting, and took for themselves and away from the corpus of the trust, in fraud of my mother, or our mother, as well as in fraud of the federal and local taxing authorities, myself, and also in fraud of the beneficiaries, if the trust is found to be valid. They took for themselves virtually the entire value of the res of the trust.

What the trustees took from the trust, and unto themselves, [50] less than four months before the death of our father, was the very valuable voting control over all of the

Goya Companies, which has already market acceptance and a real worth and is a real worth of the 53 Class A common shares of Goya Foods when they were placed in the *inter vivos* trust by my father, and that value up to four months before his death.

They then represented voting control over all of more than 11 business entities which is the conglomerate of Goya Companies. This voting control is today worth over 480 million dollars. This fraud was perpetrated by the trustees, when just prior to our father's death, they changed the corporate charter of Goya Foods, Inc. by giving voting rights to 28 Cass B shares of Goya Foods, non-voting shares, which were owned by Caribbean Canneries, Inc., a tax exempt company which they owned and thereby stripping the voting control from the shares in the trust and leaving the res of the trust with the 53 now relatively worthless shares of Goya Foods, Inc.

Unless and until the trustees put back what they took from the trust, the shares of the trust have a total value of perhaps less than 40 million dollars because in addition to that being restricted, the shares have amost no prospects of being the recipient of dividends, since the individuals in control and management of the companies have most of the profits that could be generated by Goya Foods show up in the tax exempt companies in Puerto Rico and abroad.

[51] By their maneuver, the fiducaries of the trust, which had the responsibility of protecting the asset, took over 90 percent of the value of its value for themselves.

This Court, which has the responsibility of overseeing the trust, should before approving any accounting, order the trustees to deposit enough voting shares of Goya Foods, Inc. into the trust, so that the shares in the trust again are the 59.55 percent of all of the outstanding voting shares of Goya Foods as they were prior to November 20, 1975, before the trustees changed the corporate charter of Goya Foods, Inc.

In conclusion, many issues of fact remain in dispute for which I require discovery from the plaintiffs in order to further demonstrate my proofs, including the facts that are in plaintiff's knowledge and possession relating to, one, the source of funds used by my father to start up the business that became Goya; facts tending to prove the domicile of my father when the business started in 1936; facts tending to prove which jurisdiction had the significant interest of my parents when the business started; and facts tending to prove that Puerto Rico had the most material interest in the '72 agreement and the '72 amendment, and that New York had little or none.

If I'm not given the opportunity to discover these facts in the possession and knowledge of plaintiffs, which clearly relate to the principles of law upon which they rely and which were not the subject of discovery earlier in this case, I would [52] have been denied my right to fairly litigate and my right to due process.

Thank you.

THE COURT: Thank you.

Mr. Griffinger.

MR. GRIFFINGER: Two minutes, your Honor.

Because Mr. UNANUE has said so much that is refuted by the record, I will let's the record that is in this case stand and not go into a refutation. But a couple of things.

First of all, Mr. Unanue's plea to the Court that he has to appear pro se, as far as I know up until today and until his submission pro se, Mr. Unanue was represented by Jan Alan Brody. In fact, in recent weeks Mr. Brody has requested adjournments and appeared at status conferences. His disappearance from this case, I submit, is a ploy by Mr. Unanue to try to in some fashion obtain either sympathy or further a claim at a later date of a denial of due process.

Mr. Brody is, in fact, still appearing for Mr. Unanue in the First Circuit stay application which was denied two days ago which we submitted to the Court.

Secondly, as to Carolina's estate, yes, your Honor did say he is free to pursue that in Puerto Rico. He has pursued it in Puerto Rico and nothing has changed. Why he brings that up is irrelevant.

Third, Mr. Unane concedes that Goya Foods was commenced in [53] 1936 and that in fact the asset known as Goya Foods was first acquired by Prudencio in 1936, well after he was a New York and New Jersey resident.

THE COURT: I gather his point was that Goya Foods was a successor of an unincorporated enterprize which had been acquired before that.

MR. GRIFFINGER: Mr. Unanue would suggest that there's some tracing back to the first allowance which he had received from his father. I submit that's not the law. The law is when you acquire an asset, and he acquired that asset in 1936. I submit it was 1946 when Unanue, Inc. was incorporated which was the birth of Goya Foods. I'll take 1936 because—

THE COURT: '36 was the bankruptcy date so it was after—

MR. GRIFFINGER: It was post-bankruptcy. If he was bankrupt, then I guess he didn't have very much left from this alleged conjugal partnership and he started anew. And if, in fact, that was the case in 1936, we know he was domiciled in New Jersey from 1921 forward and in New York prior to that date. In fact, even Judge Gierbolini noted that.

So under Mr. Unanue's own statements of out of bankruptcy and into Goya Foods in 1936, we have a situation where we have property acquired after Prudencio was a New Jersey domiciliary and as the *Majot* case says clearly, the case we cited in our brief, "the law of actual domicile, and not the matrimonial [54] domicile, will govern as to all future acquisitions of movable property".

Quoting from the *Gale versus Davis* case:

> "It seems now to be a settled principle that, when a married couple emigrate from the country where the

> marriage was contracted into another, the laws of which are different, the property which they acquired in the place to which they have removed is governed by the laws of that place."

And there is New Jersey, of course, applying that law to these facts.

A couple of other points and I'll sit down. There was no limit on domicile discovery in this case. We approached the domicile issue, we went back to 1901. We went back to ship arrivals in Puerto Rico at the turn of the century and whether Prudencio got off at the Virgin Islands which were then under Danish control or whether he got off in San Juan, and Judge Kole's recitation of the facts bears out the entire history of Prudencio's life. We've heard it. It's been explored. Mr. Unanue was not precluded.

Mr. Unanue says New York had no real significant contacts. In our brief we outline in bullet points all the significant contacts that New York had. Our brief is based upon the record. There is no question in my mind that under the Restatement and any fair viewing of any of the conflicts of law [55] cases, that New York had a significant interest in the choice of law provision and the contract is valid and enforceable.

Lastly, we want distribution. Mr. Unanue asked the Court "don't distribute because the res will then not be available to me". He had no rights to that res. And in your Honor's December 7, 1987 order you said, quote: This Court shall administer and retain exclusive jurisdiction over the estate and the trust and any accountings, distribution or claims with respect thereto.

We request that you nullify Mr. Unanue's claims and order distribution.

Thank you.

THE COURT: Thank you.

We've had argument now that has gone on for close to two hours. I have here in one hand that I'm holding the briefs and appendices that were submitted in connection

with the present proceeding, this, of course, being a small fraction of what is really involved in this case.

As I read all of this material I had this strange feeling that we were almost overintellectualizing something that seems relatively simple. And I must say that in rather brief remarks Mr. Quirk said a couple of things that struck me. One, with Judge Kole's decision on domicile this case unravelled—I think that was his word—and he also said something about presenting a rather simplistic approach to the matter.

[56] I don't think he meant simplistic in a derogatory sense and I think to an extent there has been something of an over-intellectualization of the matter. And I don't mean to be critical when I say that because I understand why. The Unanue family, I would think, should be shell shocked by this time.

Is there something that is waiting for you?

MR. GRIFFINGER: We'll take care of it.

THE COURT: All right.

We begin with a trust agreement and a Will in 1970 and, of course, that preceded by actions in 1969 involving the removal of Charles Unanue by Prudencio.

Now, whether the present difficulties had a genesis even before that, I don't know. In 1972, 21 years ago, it seemed as though the matters which had torn the family apart had been settled by comprehensive agreements that called for Charles to be paid 4.5 million dollars. Well, I guess the ink hardy dried before everybody was going around again in 1973 and then in July, 1974 we had the agreement which some people have spoken about so much here today.

It's difficult for me to conceive of how anyone could make the language of the 1974 agreements any broader, definitive and all-inclusive than they were. To begin with, the agreement began for a reference to a desire to finish these matters once and for all. The agreement, of course, sets out payments of substantial monies to Charles Unanue, something over four [57] million dolars.

In Section 6.03, which is entitled "Covenant not to Contest Disposition of Property by Prudencio Unanue". That is the language I referred to. Charles covenants and agrees—read the next language—for the benefit of the companies, the additional companies, Charles' brothers, Prudencio and their estates, heirs, beneficiaries, et cetera—he agrees for the benefit of all of those entities, he irrevocably disclaims, renounces any and all interest he may have or may hereafter have in the assets of estate of Prudencio Unanue, whether under any will, trust, by intestacy, by virtue of relationship, by other operation of of law or otherwise.

It's an exercise in legal ease, designed to see whether there is any conceivable word that one could think of that's not covered in this, and I think whoever wrote it passed the test. You can't think of anything else you could put in there to make it any more inclusive than that.

If you move on after the begining portions of 6.03, you come to extraordinary provisions, subparagraphs A and B. These say—well, Subparagraph A starts this way: In the event that Charles receives in any way, any stock or interest in any of the companies, he agrees to immediately sell it. And there is a provision for fixing the price.

Subparagraph B contains another provision. If in any way Charles gets any stock or any interest in these companies, he's [58] going to sell it immediately back to the company.

In other words, in no way whatsoever is he to have any ownership in the companies, nor, of course, is he to have any claim to any interest that Prudencio had or Prudencio's estate had.

Then in Section 6.08 we have the covenant not to sue which is really a repitition of what I already said, and Charles agreed that he would forever refrain from instituting and prosecuting any suit against the company, Charles' brothers, Prudencio, any of their estates.

It's difficult to understand why, in the light of that kind of language, and the receipt of four million dollars, we

should even be here today. I confess that after I heard of Judge Kole's decision on the domicile question, my conclusion, my initial conclusion was that this matter was now finished. And I assumed I would have some formal document or other to sign, but surely the only issues in the case were now put to rest.

I understood the original claim didn't seem to me to have much merit, but I understood the claim that if Prudencio was indeed a domiciliary of Puerto Rico at the time of the trust and at the time of his death, then Puerto Rican law would govern the trust and the Will. Puerto Rican law, I was told, had the forced heirship concept, and if Puerto Rican law governed, then that entire settlement was subject to being set aside.

[59] And, of course, it's a familiar principle that we live with that normally it's law of the place where one is domiciled at the time of death governs his Will.

Well, as we know in a decision that went for over 100 pages, which is some sort of record in terms of trial time in this courthouse, 147 pages, Judge Kole found that at both critical times, the date of the trust and the date of death, Prudencio was, and for many, many years, had been a domiciliary of New Jersey.

Now, of course, we have another contest. We have a contention that, in essence, Prudencio cheated his wife out of her interest in the—what is the name of that partnership concept?

MR. GRIFFINGER: Conjugal.

THE COURT: Conjugal partnership—cheated his wife out of her interest in a conjugal partnership, and what we have is Charles Unanue flatly and unequivocally challenging Prudencio's right to dispose of his assets as he chose to do.

How one can justify that in view of the express language of the 1974 agreements in which Charles agreed in about eight different ways never to do that, is beyond me.

I am satisfied, without any question or reservation, that Charles Unanue is barred by the 1974 agreements from

even raising the attack based on the alleged deprivation of his mother by his father.

[60] Frankly, it's a little difficult to listen to claims of "fraud on my mother" to the use Charles Unanue's language, and Mrs. Unanue is not here claiming this fraud and to pretend to accept the fiction that in some way Charles Unanue is defending the rights of his mother or is concerned about a fraud on his mother is, of course, absurd.

The claim is being submitted as a method by which Charles Unanue is attempting to do precisely what he agreed in 1974 that he would never do. And, of course, we have the fact that in 1974 Charles Unanue was paid something over four million dollars in consideration for his promise not to do that.

The presentation of a few moments ago in which Mr. Unanue talked about economic duress was, frankly, mind boggling. I have never quite heard anybody say that he really didn't get much because it's almost a quote to say he netted a little over two million dollars which, quote, "lasted a few years". That's a difficult concept to accept. It's particularly difficult if it's being submitted as a basis for my refusing to enforce this agreement or my finding some form of economic duress.

The argument as to why I should not enforce the 1974 agreement, of course, is based on the claim that I should apply Puerto Rican law. The claim is that the Puerto Rican law would invalidate the 1974 agreement. I find absolutely no basis on which I should apply—for me to apply Puerto Rican law to invalidate the 1974 agreement.

[61] First of all, there is a clear provision in that agreement that the parties agree that the agreement shall be governed by New York law.

Now, on the face of things, I see no reason whatsoever why I should decline to enforce that. Admittedly, there could be circumstances when such a freely negotiated choice of law provision might be ignored by a court. There could conceivably be circumstances which so strongly argue for application of the law of some other jurisdiction

that a judge might say that notwithstanding the parties' selection of the law of one state. I will not appy that. That is clearly not this case. There are clearly, and without contradiction, substantial contacts with the State of New York in addition to contacts with the Sate of New Jersey.

Certainly Goya Foods was a key part of that entire agreement. Goya was a New York corporation. Goya was primarily located in the State of New York. Excuse me. The corporation was located in New York. Mr. Unanue himself was at that time a domiciliary of New Jersey, not New York but certainly a state with a body of law virtually identical with that of New York as concerns the issues of which we're talking.

There was litigation in the federal courts of New York which was being settled and resolved by this agreement. So clearly there were significant contacts with the State of New York.

[62] Further, we have the policy of this forum state. I am sitting in a Court in New Jersey and I cannot ignore the policy of this state. If it were clear, unambiguous and the reasons were compelling as to why I had to apply the law of Puerto Rico, of course I would do so, but to do so would certainly violate some strong, important precepts of the law of this state and to apply the law of New York would not violate those precepts.

One of the strong precepts of the law of this state is that when one freely enters into an agreement and enjoys the benefits of that agreement, one should not be free many years later to attempt to renounce that agreement, to attempt to set aside the agreement and to renege on all of the obligations that one has undertaken under that agreement, particularly when one has received some four million dollars.

Another strong precept of the policy of this state is the right of any domiciliary of this state to dispose of his assets as he sees fits.

Now, an essential part of that 1974 agreement and a critical part of it was the undertaking of Charles Unanue not to challenge Prudencio's right to exercise that New Jersey right that one has to dispose of one's assets as one chooses.

Were I told to apply Puerto Rican law, I would also have to set aside, if I accept Mr. Unanue's argument, that strongly held principle of this state.

[63] It would be difficult to conceive of or create an argument to set aside this agreement if one did it in 1975, 1976, 1977. To do it in 1986 or 1987 is virtually impossible. We heard Mr. Unanue address the question of why he had delayed in launching this attack, and frankly, the reasons, stated simply, didn't constitute any reasons.

He contended, and I'm sure it's true, that Goya Foods and Mr. Unanue's brothers had substantial assets, and I discount the statement about political influence. I don't know what means. Certainly they had assets, but so did Mr. Unanue. He had four million dollars worth of assets and if he were determined to attack this agreement, even if he only had two million dolars left after paying the other bills, that certainly would have financed a proper attack on the agreement.

It was interesting that one of the other reasons—incrediblely as it seems, incrediblely as its sounds—one of the reasons why he didn't launch an earlier attack, he said, was because he would have had to pay back the money. That I find mind boggling. Of course he would have had to pay back the money. That's exactly the point and that's exactly why a court should be extremely reluctant to entertain any attack such as this at this time.

Claims of duress, in short, are submitted in conclusory language without any substance whatsoever. Claims of fraud are submitted on the same basis.

[64] I note, incidentally, that much of the argument that was submitted this afternoon by Mr. Unanue were based on statements not in the record, statements which were not even included in the brief that was submitted. I chose

to accept them but many of them are simply without foundation.

I am satisfied that at all relevant times, as Judge Kole found, from 1929 on, Prudencio Unanue was a domiciliary of this state. I am satisfied, without any question, that the applicable law which governs disposition of assets is not the law that was in effect in a state where one married many years before.

Rather, the argument submitted by Mr. Griffinger in his brief is correct. It is virtually the unanimous rule in this country, and just about every state I guess that has considered the issue, in all of the treatises and the Restatement of Conflicts of Laws, that the law that governs the ownership of assets is the law of the state one lives in, one is a domiciliary of, at the time one acquires the asset.

Simply because Prudencio and Carolina were married in Puerto Rico in the 1920's or before, does not mean that the law of Puerto Rico governs their acquisition of assets for the rest of their lives. Similarly, the fact that they were citizens of Spain at that time certainly does not govern their acquisition of assets for the rest of their lives.

As noted, Prudencio was a domiciliary of this country and [65] the State of New Jersey since at least 1929. There is no indication that the assets in question were received before 1936. One could take 1936 as a base year in view of the bankruptcy of Prudencio, and certainly the acquisition of assets thereafter while Prudencio was a domiciliary of New Jersey is governed by the law of New Jersey.

Those assets did not become subject to conjugal partnership laws of Puerto Rico simply because the couple had been married there many years before but were no longer domiciliaries of Puerto Rico.

I'm also satisfied that even if one were to apply the law of Puerto Rico under the case discussed and analyzed in the reply brief submitted by the beneficiaries, and one were to apply the tests set out in the *Toppel* case in which one seeks the greatest contacts with the transaction, the most rational conclusion is that the law of New Jersey

and not that of Puerto Rico would determine whether assets were or were not subject to conjugal partnership laws of Puerto Rico.

The two parties, Carolina and Prudencio, were domiciliaries of New Jersey. Their busines was primarily located in New York or New Jersey. They had become citizens of the United States. They were not domiciliaries of Puerto Rico and therefore, even under that test, I would find again that the law of New Jersey rather than that of Puerto Rico applies.

In view of all of the foregoing, I will sign an order first [66] approving the accounting that has been submitted. The accounting was satisfactory and is approved.

The only challenge to the accounting is based on the arguments of Charles Unanue which I have already addressed and if there are some that I neglected to address, let me just note that I have considered them, I have not overlooked them, and it's only because of the very broad approach that was submitted by Mr. Unanue this afternoon that I may overlook specific comment on some of them.

With respect to all of the arguments submitted, I am satisfied they are without merit. None should stand in the way or will stand in the way of my approval of the accounting.

I'm satisfied that the 1974 agreement is valid, is enforceable. I'm satisfied that all of the attacks on that agreement, all of the attacks on the trust that precedes the 1974 agreement—the 1970 trust that is—or any attack on the disposition provisions of the Will of Prudencio Unanue, if there was any of that, all of them are without merit and must be rejected.

Claims of fraud, conspiracy, duress are all rejected as being without merit.

The assets with which we are concerned are not subject to the law of Puerto Rico concerning conjugal partnership. They are subject to the laws of this state which, of course, do not include that concept.

[67] The 1974 agreement, as I've said, not only bars Charles Unanue's attacks, direct attacks on the trust, on the Will, or any other disposition by Prudencio. It also bars the challenge clothed in an attack seeking to enforce rights of the late Mrs. Unanue. That is nothing more than an indirect method of attempting to accomplish what Charles Unanue is barred from doing directly.

I have a form of order that was submitted.

Yes.

MR. GRIFFINGER: Your Honor, I have a slightly revised form which I'd like to give to you and to Mr. Unanue, which includes two other matters not in the original submission, one is that the cross motion of Charles Unanue is denied, which I believe is implicit in your Honor's decision.

THE COURT: If it's not implicit, it's explicit because it certainly is denied. I though I made that clear.

Well, give me a copy of it while you've got it. Give one to Mr. Unanue.

MR. GRIFFINGER: The other item is there is your Honor will recall that you restrained further disposition of the trust assets pending this adjudication.

THE COURT: Mr. Griffinger, this is fairly lengthy. I think maybe given the hour, it makes sense. First of all, I want to look at it a little more clearly and I think Mr. Unanue should have an opportunity to submit his objections to the form [68] of the order. I had looked at the prior order.

MR. GRIFFINGER: The only thing that is new—

THE COURT: All right, let me read it for a moment. Just have a seat.

MR. GRIFFINGER: Thank you.

THE COURT: Well, referring to the final paragraph of this Court's Order of December 7, 1987 and Paragraph 5 of the Order of January 4, 1988, are hereby vacated. What does that refer to?

MR. GRIFFINGER: The final—the orders are the restraining order heretofore entered by the Court in the

December 7 order. It was, quote, ordered that until final resolution of this proceeding or further Order of the Court, the trustees of the said trust are restrained and enjoined from removing the trust res or any of the assets of the trust from the jurisdiction of the State of New Jersey.

And the Order of January 4 in Paragraph 5 says the trustees shall preserve the trust assets and shall make no further distribution of trust assets until further Order of this Court.

THE COURT: Okay. Wait a minute. Is the counterclaim against Goya Foods, Inc.?

MR. GRIFFINGER: That is the fraud claim, your Honor, that's the fraud, duress.

THE COURT: Okay. I'm satisfied—did you want to say anything on the form of the judgment, Mr. Unanue? But I'm [69] satisfied that it does accurately represent the determinations that I've made here today.

MR. CHARLES UNANUE: I just have two things to say, your Honor. Number one, on the contracts, as a citizen, domiciliary of Puerto Rico, I'm bound by their laws and I cannot under Puerto Rico law validly waive a future inheritance.

THE COURT: One thing, I don't want to get anymore argument, Mr. Unanue, I've decided it. I'm just talking about the form of the order. That's all right.

I'm satisfied the order does in fact correctly set out the substance of the decision that I've made here today and I'll sign it, which I have now done.

MR. GRIFFINGER: Your Honor, may I respectfully invite your attention to Page 2 where in anticipation of Mr. Brody's appearance we put Carella, Byrne appearing. I believe if your Honor could interlineate that to indicate that Charles Unanue appearing Pro Se.

THE COURT: Okay. I will do that. Let me just say that I'm not going to rule on this definitively, but I am disinclined to enforce that provision about double counsel fees. If you want to make—this is not a definitive ruling now, but it strikes me as probably not some-

thing that I would enforce. Single counsel fees I'll certainly listen but I think that smacks of the kind of penalty that courts generally do not [70] enforce.

All right. We'll make the interlineation and with that, I've signed the Order.

Thank you all very much.

MR. GRIFFINGER: Thank you, your Honor.

MR. QUIRK: Thank you, Judge.

(4:27 P.M.)

[Filed Nov. 19, 1993]

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIV.: BERGEN COUNTY

Docket No. M-128817

Civil Action

In the Matter of the Settlement of the Accounts of JOSEPH UNANUE and FRANK UNANUE, Trustees Under the Trust Agreement Dated November 16, 1970, as Amended, By and Among PRUDENCIO UNANUE, as Grantor, and PRUDENCIO UNANUE, JOSEPH UNANUE and ANTHONY UNANUE, as Trustees of Sixteen Trusts Thereunder.

ORDER

This matter having been opened before the Court on the joint application of the Trustees, the Beneficiaries, the guardian *ad litem* for Jorge Unanue, and Goya Foods, Inc., and the Court having directed the submissions of all interested parties in acordance with its Order dated October 15, 1993, and a hearing having been held before the Court on November 19, 1993 with the attorneys for all parties to this action appearing, to wit, Quirk & Gallagher, attorneys for the Trustees (N. Patrick Quirk, Esq., appearing); Crummy, Del Deo, Dolan, Griffinger & Vecchione, A Professional Corporation, attorneys for the Beneficiaries (Michael R. Griffinger, Esq., appearing); Durkin & Boggia, Esqs., guardian *ad litem* for Jorge Unanue (Martin T. Durkin, Esq., appearing); Saiber Schlesinger Satz & Goldstein, attorneys for Goya Foods, Inc. (David M. Satz, Jr., Esq., appearing); and Charles Unanue appearing pro se); and the Court having heard and considered oral argument, and having read and considered all the papers and exhibits submitted;

IT IS on this 19th day of Nov. 1993:

ORDERED, that the Second Accounting of Joseph Unanue and Frank Unanue, Trustees under the Trust Agreement dated November 16, 1970, as submitted with the Verified Complaint and as supplemented and amended through and including June 30, 1993, be and hereby is approved as filed; and it is

FURTHER ORDERED, that this Court finds, determines and declares that Charles Unanue and the bankruptcy estate of Charles Unanue, each had and has no right whatsoever to receive any assets from Prudencio Unanue's estate or from the Trust created by Prudencio Unanue on November 16, 1970, or from any of the follow-on trusts created under said Trust; it being specifically found that the fifty-three (53) shares of Goya Foods, Inc. stock placed into said Trust by Prudencio Unanue and administered under the Trust Agreement were solely the property of Prudencio Unanue and were properly included in the Trust and that Charles Unanue and the bankruptcy estate of Charles Unanue have no interest therein, direct or indirect; and it is

FURTHER ORDERED, that the final paragraph of this Court's Order of December 7, 1987 and paragraph 5 of this Court's Order of January 4, 1988 are hereby vacated; and it is

FURTHER ORDERED, that the Trustees are hereby expressly authorized and directed to distribute forthwith from the follow-on trusts the property interests of each Beneficiary in each such trust to such Beneficiaries as have attained the age of twenty-five (25) years; and it is

FURTHER ORDERED, that on Charles Unanue's Amended Counterclaim against Joseph Unanue, Frank Unanue *et al.*, as corrected by letter dated January 5, 1990, judgment be and hereby is entered in favor of the counterclaim defendants and against Charles Unanue on the merits of said Counterclaim; and it is

FURTHER ORDERED, that this Court finds, determines and declares that the contract known as the "Amendment dated July 31, 1974 to Agreement dated June 9, 1972 for Sale of Interests of Charles Unanue in Goya Foods, Inc. and Affiliated Companies," and each and every provision thereof, was and is valid and enforceable and that Charles Unanue and the bankruptcy estate of Charles Unanue each are bound thereby; and it is

FURTHER ORDERED, that this Court finds, determines and declares that the contract known as the "Agreement dated June 9, 1972 for Sale of Interests of Charles Unanue in Goya Foods, Inc. and Affiliated Companies" (except insofar as it was expressly modified or superseded by the 1974 Amendment), and each and every provision thereof, was and is valid and enforceable and that Charles Unanue and the bankruptcy estate of Charles Unanue each are bound thereby; and it is

FURTHER ORDERED, that this Court finds, determines and declares that Charles Unanue has materially breached and continues in material breach of the 1974 Amendment by reason of his violations of Sections 6.02, 6.03, 6.04 and 6.08 thereof in this action and in other litigations, and the Court reserves jurisdiction for the purpose of determining the appropriate remedy or remedies for Charles Unanue's breach of contract; and it is

FURTHER ORDERED, that Charles Unanue's Cross-Motion dated November 8, 1993 for the relief requested therein be and it hereby is denied in its entirety; and it is

FURTHER ORDERED, that on defendant Charles Unanue's Counterclaim against Goya Foods, Inc. *et al.* judgment be and it hereby is entered in favor of the counterclaim defendants and against Charles Unanue on the merits of said Counterclaim.

/s/ Arthur J. Lesemann
ARTHUR J. LESEMANN
J.S.C

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION: BERGEN COUNTY

Docket No: M-128817

IN THE MATTER OF PRUDENCIO UNANUE

Bergen County Courthouse
10 Main Street
Hackensack, N.J. 07601

March 28, 1994

STENOGRAPHIC TRANSCRIPT OF
DECISION OF THE COURT
RE AWARD OF COUNSEL FEES

(Telephone conference)

BEFORE: ARTHUR J. LESEMANN, J.S.C.

* * * *

[3] THE COURT: Present today are—all right. Mr. Quirk, why don't you enter your appearance?

MR. QUIRK: Patrick Quirk on behalf of the trustees, Frank and Joseph Unanue.

THE COURT: Mr. Griffinger?

MR. GRIFFINGER: Michael R. Griffinger on behalf of the beneficiaries.

THE COURT: Mr. Durkin is here.

MR. DURKIN: Martin Durkin, guardian ad litem for Jorge Unanue.

THE COURT: And is someone here from Mr. Satz's office?

MS. HORN: Robin Horn, Goya Foods, Inc.

THE COURT: Are you with Saiber, Schlesinger?

MS. HORN: Yes.

THE COURT: Are there other attorneys here?

MS. KERBER: Alsison Kerber, K-e-r-b-e-r, from Crummy, Del Deo, Griffinger & Vacchione.

THE COURT: Hello. Let me know who's on the line, please. Mr. Unanue, are you there?

MR. UNANUE: Good day.

TH ECOURT: Now, Mr. Unanue, this is Judge Lesemann. Can you hear me?

MR. UNANUE: Yes, I hear you.

THE COURT: And, Mr. Lopez, can you hear me?

[4] MR. LOPEZ: Yes, your Honor.

THE COURT: All right. We are, of course, on the record, and present are Mr. Quirk, Mr. Griffinger, Mr. Durkin, a representative of Mr. Satz's office, and some of the principals. I believe those are the attorneys of record.

I'm sorry, I lost your name.

MS. HORN: Robin Horn, H-o-r-n.

THE COURT: Ms. Horn is from Ms. Satz's office. If for some reason you can't hear me at some point, please let me know, but we are recording. We have a stenographer taking this down, so we are on the record; and this represents my decision on the application for the award of counsel fees in this matter. It's both a decision and instruction as to proceeding henceforth.

I will note initially that after the oral argument that was held on January 28th, I reviewed once again, considered the arguments presented and all of the papers submitted as well and, for short, I will refer to Mr. Quirk's clients and those of Mr. Griffinger, Mr. Durkin, and Ms. Horn as the Plaintiffs, and Charles Unanue as the Defendant.

I'm satisfied that—I'm holding up for an airplane. I'm satisfied that the Plaintiffs are entitled to the award of counsel fees under Section 8.01 of the 1974 agreement between the parties. The full title of that agreement is, and I quote, "Amendment Dated July 31, 1974 to Agreement Dated June 9, 1972 [5] for Sale of Interests of Charles Unanue and Goya Foods, Inc. and Affiliated Companies." I'll refer to that hereafter as the 1974 agreement.

MR. UNANUE: Your Honor, may I say something?

THE COURT: You can only say that you weren't able to hear me. Other than that, I would prefer that you not interrupt my decision. When we're all finished, if you have a question, I'll be happy to hear it.

MR. UNANUE: Okay. Fine.

THE COURT: Was that Mr. Unanue that just spoke?

MR. UNANUE: Yes.

THE COURT: Fine. That was Mr. Unanue that just spoke.

Okay. Section 8.01 reads as follows: It says, "In the event of any suit, action, or proceeding instituted by any signatory to this amendment, or the collateral covenants at the foot hereof, or by Prudencio Unanue involving any other such signatory, or Prudencio Unanue concerning any matter, the party"—and I'll note I've eliminated and just omitted some of the non-relevant material—"the party who has been successful on the merits or otherwise shall be entitled to receive from the losing party as liquidated damages an amount equal to twice the sum of his, its, or their out of pocket costs and expenses of litigation, including but not limited to witness fees and reasonable attorneys fees."

[6] To analyze those provisions of Section 8.01 calls on me to address four questions representing the four subparts of Section 8.01. The first question is whether there has been a suit, action, or proceeding. The second question is whether such a suit, action, or proceeding was instituted by a signatory to the 1974 agreement or by a signatory to the collateral covenants attached to that agreement or by Prudencio Unanue. Third, did the suit or action involve some other signatory to the agreement or the collateral covenants or Prudencio Unanue. Fourth, have the Plaintiffs, who are the prevailing parties—I'm sorry—who are the applying parties here, have the Plaintiffs been "successful" in this suit or, conversely, has Charles Unanue been the losing party.

Now, I note starting with the first question, that the suit or proceeding referred to need not have been com-

menced by the ultimate losing party. It could have been started by either side. In this matter, the actual complaint was filed by the Plaintiffs, although the complaint was at least in some sense instituted as a result of Charles Unanue's having indicated an intention to challenge the agreements which were contained in the 1974 document. However, in view of the fact that Section 8.01 applies regardless of which side institutes the suit, I don't have to decide in any detail which party should be viewed as having instituted the proceeding. The fact is obviously there has been "a suit, action, or proceeding." [7] In fact, there have been several of them.

The second question is the only one of the four that requires some relatively lengthy discussion; that is, whether the action can be treated as having been instituted by a "signatory" to the 1974 agreement or by a signatory to the collateral covenants or by Prudencio Unanue. Well, the signatories to the 1974 agreement itself; that is, on this side of the case, are only the various corporations covered by the agreement. Of the applicants for counsel fees here, the only one that is a signatory to the actual agreement is Goya Foods, Inc., so Goya Foods, Inc. is such a party and, clearly, that corporation is covered by Section 8.01. Litigation expenses incurred by it are covered by the provision.

The collateral covenants that are referred to as forming part of and attached to the 1974 agreement are signed by Joseph Unanue, Frank Unanue, and Anthony Unanue, the three brothers of Charles. So far as appears on the collateral covenants, those three brothers signed those documents on their own behalf, not in their capacities as executors, trustees, or anything else. Clearly in their individual capacities, they would be covered by Section 8.01. However, they have not submitted a request for counsel fees here payable to them in their individual capacities. They have, of course, submitted such requests in their capacities as trustees of the Unanue trusts.

[8] Prudencio Unanue was not a party to or a signatory for the 1974 agreement or to the collateral covenants.

Quite obviously, however, he was the beneficiary of that agreement and the covenants. Trusts created by him and the disposition of his estate were obviously a primary focus of the entire 1974 agreement as well as the earlier 1972 agreement. Clearly it is for that reason that Section 8.01 specifically refers to and specifically covers a suit or action brought "by Prudencio Unanue" or an action involving Prudencio Unanue. Prudencio Unanue, of course, died before this present round of litigation, so instead of Prudencio himself being a party to the litigation, those parties who, in essence, replaced him, who stood in his shoes, consists of the trustees of the trusts established by Prudencio and the beneficiaries of those trusts. I am satisfied that those trustees and those beneficiaries did and do stand in the place of Prudencio Unanue with all of the rights of Prudencio as conferred by Section 8.01. There are several reasons for that conclusion.

First, Section 8.02 of the 1974 agreement specifically states that the agreement, and I quote, "shall be binding upon the parties hereto and their successors, and shall inure to the benefit of the parties hereto, their heirs, beneficiaries, successors, legal representatives and assigns, and Prudencio Unanue and his heirs, beneficiaries, successors, and legal [9] representatives." There is no reason why that all-inclusive language should not be given its normal, full, and obvious meaning. It says and it means that the agreement is binding upon the parties, and—I underline and—their estates and succesors and, similarly, the agreement has also been entered into for the benefit of and can be enforced by the estates and beneficiaries of those parties.

That is particularly true as applied to Prudencio Unanue. As I said a few moments ago, the very heart of the agreement, the basic reason for entering into the agreement is to permit and provide for Prudencio's disposition of his assets to his heirs and beneficiaries, and there are several sections of the agreement which support that conclusion. Section 6.03 contains Charles' disclaimer and

renunciation of any interest he may have in, and I quote, "the estate of Prudencio Unanue." In that same paragraph in order to give effect to that disclaimer and renunciation, Charles covenanted and agreed for the benefit of and I quote, "the companies," "the additional companies, Charles' brothers, Prudencio Unanue and—and I underline—their estates, heirs, beneficiaries, successors, legal representatives, and assigns."

Section 6.08 is another key section in the agreement. That contains Charles' covenant not to sue, and he agrees in that section to forever refrain from instituting any suit or proceeding against, and I quote, "any of Charles' brothers or [10] Prudencio or any of their estates, heirs, beneficiaries, successors, or legal representatives," and there is similar language in Section 6.04 which I won't go through. It's similar to that which I just referred to.

Since so much of the agreement relates to disposition of Prudencio's assets after his death, it would be, to say the least, anomalous to conclude that Prudencio's estate or his executors, trustees, or the beneficiaries of the estate could not enforce the agreement. There's certainly no reason to reach such a senseless conclusion, particularly when all of the language of the agreement as I've just referred to leads to the contrary conclusion.

In sum, I'm satisfied that for purposes of Section 8.01; that is, the counsel fees provision, the trustees of the trusts established by Prudencio and the beneficiaries of that trust have the same standing as did Prudencio himself to enforce a claim for counsel fees. A suit instituted by or against those trustees or those beneficiaries is, for the purposes of Section 8.01, a, "suit, action, or proceeding instituted by or against Prudencio." That dealt with the second of the four issues that I saw in Section 8.01. The remaining two can be disposed of quickly.

The third question is whether the suit or proceeding involves some other signatory. Well, the other signatory involved is, of course, Charles Unanue. He obviously was a [11] signatory, and he has been a party to these proceedings.

The fourth question also can be disposed of quickly. That is the—strike that. Section 8.01 provides for the payment of counsel fees in favor of the party, and I quote, "who has been successful on the merits or otherwise." There's no question that the Plaintiffs have been successful on the merits here. They have won all of the litigation. Charles Unanue has lost the litigation. The conclusion is clear that the Plaintiffs are the successful parties, and under Seciton 8.01 for all of the reasons I've just stated, I am satisfied that the provision authorizes the award of litigation expenses, including attorneys fees in favor of the Plaintiffs and against Charles Unanue.

I want to speak next about the applicable law. The 1974 agreement provides that it shall be governed by the law of the State of New York. I will note in passing that actually that Statement is in the 1972 agreement. The 1974 agreement is actually an amendment of the earlier '72 agreement and carries over that provision about the applicable law. There's no question that New York law provides for and authorizes the award of counsel fees when it is authorized by contract. The cases cited by the Plaintiffs do indeed support that proposition. I won't go through them here. I am also satisfied that New Jersey law is the same on that point. Again, the cases cited support that proposition, and I won't go [12] through them.

In short, the law is clear no matter to which State we look, and it is clear that a provision such as that in this agreement; that is, a provision such as Section 8.01, is indeed enforceable. There is no reason why I should decline to enforce it and every reason why it should be enforced and, accordingly, I will indeed enforce it. I will note, if I didn't make myself clear, that I'm satisfied New York law does apply but, as I said, it will not matter in any event because New Jersey law is the same.

I want to deal next with the provision of Section 8.01 which provides for the award of double legal expenses. Section 8.01 is described as a liquidated damages provision. The law is settled both in this State and, I believe, New York as well, that liquidated damages provisions are

enforceable if reasonable. The law is also clear that liquidated damage clauses which are, in fact, penalties, will not be enforced. There's no question in my mind that when Section 8.01 calls for an award of twice the sum of one's legal expenses, the provision is a provision for a penalty. It bears no relationship to anyone's damages or out of pocket expenses. Plaintiff calls it a deterrent, and maybe that's what it was intended to be, but that doesn't change the fact that the deterrent sought was the imposition of a penalty. As such, it is not enforceable and will not be enforced.

[13] The invalid provision or that portion of the provision which is invalid does not, however, invalidate the entire Section 8.01 provision for payment of counsel fees. Again, the law cited by the Plaintiffs is accurately cited, and I'm satisfied in much the same way that a Court frequently modifies an overly broad restrictive covenant in an employment contract, that this Court can and should and, therefore, I will modify that overly broad invalid damage clause and reduce it to something which is lawful and enforceable, which is the provision for payment of legal expenses, including counsel fees, once, not twice. I will briefly mention other theories submitted by Plaintiffs in support of their claim for counsel fees. In view of the conclusions that I have just set out; that is, that Section 8.01 authorizes the award of these fees, there's really no need for me to consider the alternative theories presented. I will refer to them just briefly.

Plaintiffs' first alternative theory is based on Charles' covenant not to sue. They argue that Charles breached that covenant and, therefore, the legal expenses they incurred represent damages, and they can recover those damages in the same way, I guess, that a Plaintiff hit by a careless driver can recover his or her damages. Well, the cases cited by Plaintiff deal with the enforceability of a covenant not to sue, but none of them, to my awareness, supports a claim for damages for breach of such a clause. They deal with preventing [14] or enjoining the institution of suit or dismissing a suit, and I'm not clear

that any controlling law in either this State or New York would justify the award of damages for violation of such a provision.

The second theory, alternate theory, is based on New Jersey's frivolous claims statute, 2A:15—I'm sorry—2A:15-59.1. Well, there are a number of difficulties with that claim. First, the effective date of that statute was December, 1988, and it applies only to causes of actions filed on or after that date. This claim was—this suit was filed before that date. Plaintiffs argue that Charles filed a counterclaim after that date and, thus, the statute applies. That argument is imaginative, but I don't find it terribly persuasive. I'm not aware of any theory that would support it.

In any event, the recent decision by our Supreme Court in McKean Brand (ph) against Trump Castle, a 1993 decision, substantially cut back on the scope of the frivolous litigation statute. I'm particularly aware of that because I wrote what I was convinced was a learned decision on that, and then the Supreme Court about a month later "unlearned" it by deciding all of it the other way. It's not really clear how much remains of that statute after that decision, particularly in view of the Court's conclusion that reliance on the advice of one's attorney constitutes a defense to a claim under the frivolous claims statute. It's not at all clear to me that [15] Plaintiffs could establish a claim under that statute.

Plaintiffs also submitted a theory under which Charles' claim was analogized to a malicious prosecution suit. Well, to accept that argument would really render the whole frivolous claim statute redundant and creates a new cause of action, another argument which I find imaginative but not persuasive.

There is also an argument submitted as to Plaintiffs' right to costs pursuant to R.4:42-A. That covers so-called costs which do not include counsel fees. It would indeed authorize the award of such non-counsel fee expenses, but I think that represents a very small part of the fees and costs we're talking about here.

In sum, the only basis I find that is persuasive is the argument based on Section 8.01. If I were not convinced that that section applied, we might need a more detailed analysis and examination of the frivolous claims statute presentation. I don't find that necessary. I'll note another reason why I am dissuaded from following that argument through to its ultimate conclusion. So much of this case dealt with litigation before Judge Kole. It would seem to me if one were to ask whether that litigation, which was a giant part of the time spent, was indeed frivolous, that issue may indeed be one that should be referred back to Judge Kole. I guess I'm understandably reluctant to do that, particularly since it [16] might lead to Judge Kole terminating his recall. In any event, I don't think it's necessary to do it.

The next question deals with the amount, the quantum if you will, of the request of the Plaintiffs. The total request comes to something over seven million dollars. I think a couple of propositions are clear. Number one, the award of counsel fees must be reasonable. The mere fact that bills have been submitted in that, to say the least, substantial sum, does not mean that necessarily that amount is reasonable or Plaintiffs are entitled to recover that amount. Obviously with a number of that size, approval or even treatment of such a request could not be handled on a pro forma basis. It obviously requires a detailed and, I'm sure, lengthy analysis of the request.

As I mentioned the last time, I had a number of questions as to how best to proceed to deal with that question of what is a reasonable award of fees in this matter. I have concluded—I have decided to proceed as I indicated tentatively the last time I would like to proceed and; that is, by appointment of a Master. R.4:41-1 has been relaxed by the Supreme Court. There is a directive from the Court that authorizes the appointment of a Special Master under that rule, and I quote, "when all parties consent or under truly extraordinary circumstances." The procedure is for the Judge involved, who would be me, to make such an appointment and [17] submit it—or request

for an appointment—and submit that to the Assignment Judge; in this county, Peter Ciolino, and ask his approval. I have already spoken to Judge Ciolino. I have described this matter as fully as I could, and he has indicated that he will indeed approve my appointment of a Special Master.

Now, I note that during the oral argument when we were last here, there was an indication of an agreement by both sides to the appointment of a Master. Thereafter, Charles Unanue, by letter, withdrew that consent. Accordingly, I am proceeding under the second portion of the Supreme Court directive on the grounds that this case does involve "truly extraordinary circumstances." The truly extraordinary circumstances, to begin with, inhere in the shear volume, the shear number and magnitude of the counsel fee request in this matter, something over seven million dollars. As I indicated and as Mr. Charles Unanue has already indicated, he certainly will want to and has every right to examine applicable and appropriate records of the Plaintiffs dealing with this request. That includes, without limitation, the time records that go to make up the bills.

There will, undoubtedly, be some discovery. As I indicated already, the litigation before Judge Kole which dealt with the domicile issue, I believe, took something over 100 days of trial. There is no question in my mind that were I to undertake resolution of this issue, it would tie me up for a [18] disproportionate amount of time. It would also necessarily involve me in relatively—the relative minutia of this matter dealing with discovery, dealing with all of the infinite number of details which I suspect would have to be explored. It is, in my judgment, a most appropriate case for use of a Master. I have spoken to Warren Kaps who is an attorney in Hackensack. I have told him of this matter, and I've indicated to him that I intended to appoint him as a Master. He indicated he was more than happy to assume that position. I've indicated the same name to Judge Ciolino, and he's indicated to

me his willingness to approve my appointment of Mr. Kaps to that position.

The duties of the Special Master will include determining what are reasonable counsel fees and other costs in this matter. In doing so, he will be guided by normal rules of law applied by courts in fixing fees. There is a significant body of law that deals with such matters. I do not believe there is any difference between the law of New York and New Jersey in how one measures reasonable counsel fees. I am not, frankly, at this point totally clear whether if there was a difference, the law of New York would apply or whether this would be treated as some kind of procedural issue and, thus, the law of the forum would apply. If Mr. Kaps believes that there is an issue that would make a difference, and if he decides that he wants to submit that issue to me for resolution, he may do so. Otherwise, he will either make the [19] initial determination himself if he thinks it's appropriate or significant, and proceed in all respects as he deems it is necessary. He will examine the bills in question. He will examine such back-up data, including time sheets, as he deems appropriate and necessary. He will take testimony if and when and to the extent that he deems it necessary or appropriate to do so. He will permit necessary and reasonable discovery, and he will control it. He will schedule it or approve the scheduling of discovery, and he will take whatever steps are necessary or appropriate to keep discovery within reasonable limits.

In short, Mr. Unanue, Charles Unanue, is certainly entitled to reasonable discovery. I suspect it may require some determinations by the Special Master as the case proceeds to both permit that reasonable discovery and prevent it from going beyond the reasonable and into the unreasonable. All interlocutory issues that arise, including discovery issues, shall be determined by the Special Master. The Special Master may ask for my advice or ruling or instruction as he deems it necessary or appropriate along the way. It would be my preference that he submit relatively few issues to me, but if he deems it

necessary to do so, he will, of course, do so. He will, of course, consider and determine what is a reasonable time and what are reasonable efforts expended by Plaintiffs' Counsel and what are reasonable hourly rates charged, or if [20] there is some other basis on which the counsel fees were determined, he will determine the reasonableness of those other methods. He will also, among his other considerations, determine whether there has been any unnecessary duplication of services among the different attorneys. When he has completed his job, his performance, he will submit to me, with copies to the parties of course, his conclusion which will include numbers, dollar amounts, and the reasons for his conclusions. At that time when that has been submitted to me with copies to the parties, we will then fix a schedule to hear any objections to the Master's report, if there are any, and for me to render whatever final order may be appropriate. When he is in a position to do so, the Special Master will advise me of what he anticipates as a schedule for completion of his services.

I will ask Mr. Griffinger to prepare an appropriate order embodying my decision and also the appointment of the Special Master.

MR. GRIFFINGER: Your Honor, I have two questions.

THE COURT: All right. Make sure you speak—Mr. Griffinger is speaking now, and go ahead.

MR. GRIFFINGER: Your Honor, I have two questions. One is will Mr. Kaps also be responsible for determining any claimed issues of attorney-client privilege? As your Honor will recall, we have redacted some of our submissions, bills, and other materials to protect the attorney-client privilege.

[21] THE COURT: Yes. He will decide that issue the same way he decides any other issue that's presented. He may submit it to me if, but only if, he deems it necessary to do so, and let me interrupt you because I left out another point, and that may be what you're com-

ing to next and; that is, payment for the services of the Special Master. I'm sorry I left that out. I don't quite know how I did that.

I have determined that at least initially, payments for Mr. Kaps' services shall be by the Plaintiffs. Following completion of the matter, following disposition, or following determination I should say by the Special Master and the entry of the final order, if the Plaintiffs wish to do so, they may at that point make an application to me to require Charles Unanue to bear some portion or all, if they choose to do so, of Mr. Kaps' expenses. I'm satisfied that given the magnitude of the fee request in this matter and also what I believe is, at least on the face of things, the greater ability of the Plaintiffs to bear these fees, the initial determination shall be that the Plaintiffs will pay Mr. Kaps' fees subject to what I said; i.e., at the end a request to modify that and require Charles to pay some portion or even all of Mr. Kaps' fees.

During the proceeding, Mr. Kaps will submit from time to time his bills for services, and if they do not present a problem or if there's no objection to them, they should be paid within a reasonable time after submission. I will advise Mr. [22] Kaps that he should, in essence, hold back a substantial portion of his fees. I don't want to leave the Plaintiffs in an untenable position where as the matter proceeds they have to start arguing with the Special Master about his fees, and so my initial thought was, "Well, he should just hold everything until the end," but then I thought that could be a hardship because he could be in here for a very large amount of time himself, and it would be unreasonable to have him wait an inordinate period of time while he invests all of this time and effort and money into this case, so from time to time he may submit bills representing a portion of his fees. I'll discuss that with Mr. Kap to, as I said, be certain that his bills are substantially under any amount that could be disputed, perhaps something like half along the way.

MR. GRIFFINGER: Again on that subject, our ultimate damage award or liquidated damage award for counsel fees will be part of the bankruptcy claim that has been filed by Goya Foods in the bankruptcy of Charles Unanue. and that relates to the contract, liquidated damage Section 8.01 that your Honor alluded to. However, the burden of the cost of the Special Master would be, of course, a post-bankruptcy event and would not properly be part of a proof of claim but, in my view, should be a part of the administrative cost of the bankruptcy proceeding or of Charles individually. I only put that on the record not asking your Honor for any ruling, but to indicate to [23] your Honor that we don't want to mix apples and oranges and have this subsumed in the overall bankruptcy claim when it really is a separate matter, and the last question I have is with regard to time frame. We are scheduled to go before the bankruptcy court on May 17th to report to the Court on the status of the liquidation of the claim of Goya Foods against Charles Unanue and his estate, and I wonder if your Honor could give us a time frame by which this matter could be concluded so that we could report on May 17th to the bankruptcy Judge what your Honor has ordered and where we're going.

THE COURT: All right. I couldn't begin to guess at the time. I think that as soon as we have the order submitted, I would think the first order of business would be some form of status conference or meeting with Mr. Kaps at which a question like that should be explored. I don't even know at the outset if he would be able to give you a time sequence, but just as when any piece of litigation comes before me, my first step is usually a status conference at which we try to set out a schedule for resolution of the matter. It's difficult for me to believe, frankly, that anyone could come close to meeting that May date that you just referred to, but I think you'll have to review that with Mr. Kaps.

Mr. Charles Unanue, did you want to say anything or ask any question at this point?

MR. UNANUE: Yes, your Honor, and I appreciate your [24] understanding of this case, but I do want to say that I am participating in the conference call because I was informed by Mr. Griffinger that you ordered it, and I am complying. My understanding is that I am not a Defendant nor a party in the proceeding since I was substituted by Mr. Lopez who is on the telephone, and—

THE COURT: Hold on just a minute. Would you back up just a little bit and talk a little louder? Our Reporter is having a little trouble hearing you.

MR. UNANUE: Let me back up.

THE COURT: You said you were not a party to this. Proceed.

MR. UNANUE: Is this clear now?

THE COURT: Go ahead. You said you were not a party to this proceeding because Mr. Lopez was substituting for you?

MR. UNANUE: That is correct.

The Court: Okay.

MR. UNANUE: He is the bankruptcy trustee. I did request of the bankruptcy court to be allowed to represent the bankruptcy estates because Mr. Lopez was not present, and that request was denied by the bankruptcy court, so actually I will follow your orders and continue to do whatever I can to present my side or the bankruptcy court side of it, but I am not authorized to actually represent them. My substitution was by the bankruptcy trustee in addition to being required by the [25] bankruptcy court at the approval of your Honor and of all the parties in the action, but I am just hanging in the best I can.

THE COURT: All right. Thank you, Mr. Unanue. Mr. Lopez, do you want to say anything?

MR. LOPEZ: Yes, your Honor.

THE COURT: Can you get a little louder?

MR. LOPEZ: Yes, of course, your Honor. Your Honor, basically my two inquiries—

BEST AVAI

THE COURT: Your two inquiries were addressed by Mr. Griffinger?

MR. LOPEZ: The first one in my notes was the payment for Mr. Kaps.

THE COURT: All right. Just a moment. Our Reporter is having trouble. Try again, Mr. Lopez, please. Mr. Lopez?

MR. LOPEZ: Yes, sir.

THE COURT: Did you say both of your inquiries had been addressed by Mr. Griffinger?

MR. LOPEZ: Pardon me?

THE COURT: Did you say both of your questions had been addressed by Mr. Griffinger?

MR. LOPEZ: Right, concerning the payment for the Special Master being appointed by you, your Honor, and, secondly, as to the time frame for Mr. Kaps to address and conclude the task appointed him.

THE COURT: Okay. All right. Thank you, Mr. Lopez.

[26] MR. LOPEZ: You're welcome.

MR. UNANUE: Mr. Lopez is the only party Defendant as far as I understand it, but I will comply with any order you give me.

THE COURT: Okay. Thank you, Mr. Unanue.

MR. UNANUE: You're welcome.

MR. GRIFFINGER: Your Honor, your Honor mentioned a status conference which I think, of course, is necessary after your Honor speaks to Mr. Kaps, and we would attend. I trust Mr. Kaps—

THE COURT: I'm not going to schedule that. Mr. Kaps is—you'll deal directly with him from now on after this order is signed.

MR. GRIFFINGER: Just so it's clearly understood, he has the full power of the Court to order parties to attend a status conference and to compel their attendance so that we don't get into a situation where people are not showing up and we're delayed? That's my concern.

THE COURT: Well, look. I'm not going to start dealing with hypothetical situations. If an attorney or a

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party fails to appear at a status conference that I schedule to set out the procedural schedule for the case, I can do one of two things, and on different occasions I've done either or both of them. Number one, dismiss that party's pleadings or claims or, number two, say, "All right. Don't come. Then we'll do [27] the arrangements without you and you'll be bound by them." Now, what would seem to be appopriate in this case, I'm really not ready to say at this point, and I think Mr. Kaps will have to make that initial determination. There are procedural aspects. As I say, on occasion I'm perfectly happy to go along with the input of one party, and my feeling is that the party who doesn't show and doesn't participate is left to take things as they are evolved without his participation. Again, what's going to happen, I'll deal with that if and when it becomes necessary to do so.

MR. QUIRK: Judge, if I may make one observation. I'm a little concerned with the posture that this places the Plaintiffs in. They then have to bear the whole burden of any delays, or it puts Charles in a position where all delays work in his favor, and so he would be motivated to delay, and particularly in light of the history of this case, that if he then delays, drags his feet, asks for unusual amounts of discovery, that we're bearing the whole burden of that time span.

THE COURT: Is that a statement that I can post on the courtroom to apply to every Plaintiff and every Defendant or 90 percent of them? Well, of course what you say is true, and it's true in a lot of cases, and I think I said a couple of times that it will be the obligation of Mr. Kaps to permit reasonable discovery and prevent unreasonable discovery, to [28] shepherd the matter along as promptly and as quickly as reasonably possible given the enormity of the claim, frankly, that's here, so all right, yes, you're absolutely right, but I don't know what I can do about that now.

MR. QUIRK: All right. But under the situation where we have an alleged bankrupt Defendant, he's

appearing in this pro se, we're bearing the burden of the expenses as they go along. I just think it puts us in a bad posture and, frankly, I don't have an answer to what your Honor said, but I throw that out in the hopes that there was some solution to this.

THE COURT: If it made you feel better to say all of that, that's fine. I don't know what—I think it's inherent in the situation in which you're trying to assert very large claims, and there's a lot of difficulties involved in it, but I think that's been the history of this case since it began, so okay. Is there anything else that must be said? Otherwise, we'll terminate this rather unusual proceeding.

MR. LOPEZ: Your Honor?

THE COURT: Mr. Lopez, yes?

MR. LOPEZ: Your Honor—

THE COURT: A little louder, please.

MR. LOPEZ: Yes. One is a question. I understood, your Honor, that payment for the Master will be initially paid by Plaintiff, and Plaintiff requests that Charles pay all or part of the Master, that they can request that. However, there [29] is no cap, ceiling to the Master rate, hourly rate, or I didn't hear that in any way.

THE COURT: No, I didn't place a ceiling on the Master at this point. I will reserve, and it will be part of my job to approve his counsel fees as finally submitted, and at that time I will, and if I feel his fees are unreasonable, I will not allow him all that he asks for. That's about all I can tell you. I'm not going to put a schedule on his fees at this time.

Okay. Thank you all very much.

MR. LOPEZ: Thank you, your Honor.

MR. UNANUE: Thank you, your Honor.

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIV.—BERGEN COUNTY

Docket No. M-128817

In the Matter of the Settlement of the Accounts of JOSEPH UNANUE and FRANK UNANUE, Trustees under the Trust Agreement dated November 16, 1970, as amended, By and Among PRUDENCIO UNANUE, as Grantor, and PRUDENCIO UNANUE, JOSEPH UNANUE and ANTHONY UNANUE, as Trustees of Sixteen Trusts Thereunder.

Bergen County Courthouse,
Hackensack, New Jersey

February 23, 1995

TRANSCRIPT OF PROCEEDINGS

BEFORE: HONORABLE ARTHUR J. LESEMANN, J.S.C.

* * * *

February 23, 1995

[3] THE COURT: All right. Do you want to come up on Unanue, please.

Nobody over here?

MR. GRIFFINGER: No, your Honor.

THE COURT: All right. This is the matter of Unanue, and I will just identify it that way. Can I have the appearances of counsel, please.

MR. GRIFFINGER: Michael R. Griffinger for the beneficiaries.

MR. SATZ: David M. Satz, Jr. for Goya.

MR. QUIRK: Patrick Quirk for the Trustees Joseph and Frank Unanue.

MR. DURKIN: Martin T. Durkin, Guardian ad litem for Jorge Unanue.

MR. KAPS: Warren Kaps, Special Master.

THE COURT: All right. Mr. Kaps, if for no other than esthetic reasons will you sit over here.

MR. KAPS: Delighted to, that's usually my seat over there.

THE COURT: I take it that Charles Unanue is not present nor is anyone present on his behalf. If I'm wrong on that someone speak out. I hear nothing. But I take it that, Mr. Griffinger, you haven't seen Mr. Charles Unanue here this morning or anyone on his behalf?

[4] MR. GRIFFINGER: That's correct, your Honor.

THE COURT: And no one else has. The matter was listed for 11:00, it is now 2:00. I certainly haven't received any message indicating that Mr. Unanue was on route or stuck in traffic or anything of the kind; and, of course, there have been many proceedings at which Mr. Unanue, Charles Unanue, has not appeared. So my conclusion is that he's not about to appear today, so we will then proceed.

And I guess the moving papers came from, who—Mr. Griffinger, so why don't you open the proceeding, or Mr. Quirk, either one, tell us why we're here and what relief you're seeking.

MR. GRIFFINGER: Yes, your Honor. We are here pursuant to your Honor's earlier order in which you referred to M. Kaps as Special Master the task of reporting to your Honor with respect to the damages to be entered in this case, your Honor previously having adjudicated all the liability issues and entered appropriate orders thereon.

Mr. Kaps, pursuant to your Honor's order, has conducted the hearings, both pre-hearings and hearings with respect to the amount of counsel fees to be allowed as damages under section 8.01 of the agreement, all of which

is recited in our papers. Mr. Kaps has submitted a report, findings of fact and conclusions of law to the Court, having concluded those hearings and the testimony and evidence that was submitted at the hearing.

[5] We have returned a motion returnable today to confirm the report and findings of fact and conclusions of law of the Special Master. The Special Master has determined the amount of the counsel fees that he deemed to be reasonable pursuant to his report, which your Honor has.

The only exception to the report that we noted in our papers was the reduction of the fee of Skadden Arps by 25 percent, a fee that had already been voluntarily reduced by ten percent; but we do not take exception to that in the formal sense of asking your Honor to revise the report in that respect, rather, we note our disagreement with the conclusion; but our motion does seek to have final approval of the report and entry of a final judgment.

The report, I would note, only deals with counsel fees billed and paid through November 1993, some year and a quarter ago. We have not sought, either before the Special Master or, today, before the Court, counsel fees from Charles Unanue or his estate with respect to services after November 1993, and I remark upon that because Mr. Unanue has said to your Honor in correspondence and at hearings that he was fearful that one of the things that would happen to him was that a judgment would be entered for that time of the attorneys which he estimated to be accruing at the rate of, I think, $1,700 an hour as the Special Master's proceeding went along.

What we do, however, seek, in addition to the amount determined by Mr. Kaps, are two things. One, is 50 percent of [6] Mr. Kaps' fees and charges for his performance as Special Master, and we itemized that in our papers and in our proposed form of judgment, put in a figure.

We did receive one further invoice, which has been paid, subsequent to the submission of our papers, and that invoice was in the amount of $5,405.35. If 50 percent

of that invoice is added to the amount that we have previously paid, the total 50 percent share, if your Honor sees fit to grant it as part of our judgment, would be $8,642.45.

THE COURT: Once more.

MR. GRIFFINGER: $8,642.45.

And I would like to make part of the record the invoice correspondence to us from Mr. Kaps' firm dated February 9th, 1995, and I know I sent out a check to Mr. Kaps, I don't know if he's received it yet, but we have paid that invoice.

THE COURT: Am I correct then Mr. Kaps' total charges for the matter was—would be two times that 86 42 number?

MR. GRIFFINGER: Precisely, your Honor.

THE COURT: What I make to be $17,284.90. Is that your understanding, Mr. Kaps? You don't have it right in front of you, right?

MR. KAPS: I'm a little embarassed, only because I don't see the bills when they go out, your Honor, on court assignments. I have to assume Mr. Griffinger took the bills received from my office and that they would be accurate.

[7] MR. GRIFFINGER: The other aspect of the relief that we seek is prejudgment interest, and Mr. Unanue has submitted two letters to your Honor, we have responded to those letters. In fact, we have communicated to Mr. Unanue on everything that we have submitted by way of fax to his New York number, his Puerto Rico number by Federal Express and by ordinary mail, to try to insure that he received everything; and as we have also sent copies to Mr. Brody who remains counsel of record.

I would note in that regard that we submitted to the Court a recent brief filed in the United States Supreme Court where Mr. Brody is acting on behalf of Charles Unanue that's dated this month as part of our submission. So Mr. Brody does continue to act for Mr. Unanue despite the fact he is not here today.

I would also note that certiorari was denied on Tuesday in the matter in which that brief was submitted.

Moreover, we are in receipt of an application from the Bankruptcy Court in Puerto Rico where the trustee has asked permission of the Bankruptcy Court to retain Mr. Brody for the purpose of the appeal in this litigation, which, of course, is not yet final but, hopefully, that's why we're here today.

Back to prejudgment interest. We believe that, of course, it is discretionary in the Court to allow or disallow prejudgment interest, but there is no doubt that these fees have been paid by Goya over the years, and we have, in our submission, constructed a detailed chart showing the interest that has run on these fees [8] from the end of the year in which they were paid. We didn't do it month by month, we did it, took the year end fees and then computed interest thereafter.

And if there are any questions with respect to—

THE COURT: Yes, one question, and that concerns the form of judgment and, as a matter of fact, something that's the theme that's run through a lot of these proceedings, the judgment as you have drafted it provides that Charles Unanue and the Bankruptcy Estate of Charles Unanue are liable for certain amounts and that formula follows through. The formulation of Charles Unanue and the Bankruptcy Estate of Charles Unanue is unusual. Does this—it would seem to me that it should be one or the other; although it may be inapproriate at this time to say whether it's one or the other or which it is.

But why, why did you phrase your judgment in that way?

MR. GRIFFINGER: We framed it that way because when we obtained relief from the stay in the bankruptcy court it was to permit us to continue and conclude this proceeding which, of course, pre-dated the bankruptcy petition. We determined that since Charles Unanue was the defendant in this case that he is the proper person against whom the judgment should be entered, the stay

having been lifted to permit just that fact, the entry of a judgment against party defendant Charles Unanue.

However, because the trustee has also been a party in these proceedings we felt that it would be appropriate to have the [9] judgment run against not only Charles Unanue, but the Estate—not, of course, against the trustee individually—but his Estate, and that's why we framed it that way.

We considered whether it should be the bankrupt—Charles Unanue and/or the Bankruptcy Estate, but we didn't think that was approriate, so we made it only in the conjunctive.

If your Honor were to strike one of the two designations I would think it would be approriate to strike the estate as opposed to Charles Unanue because Charles is the party against whom this was permitted to proceed.

But, frankly, because of the participation and submission, in fact, by the trustee of materials to your Honor, we felt it most approriate so there would be no problem when we go back down to Puerto Rico as a creditor with a claim to have a liquidated claim against both Charles and the Estate.

As your Honor knows, under Section 362 of the Bankruptcy Code is the lifting of the stay permits us to go up to and including the entry of judgment and any appeals, but as far as collection we must go back to the Bankruptcy Court and say to the Bankruptcy Court here is our claim, we wish to realize upon it in this Court, and that's why we framed it the way we did.

THE COURT: The trustee has been provided with a copy of this proposed judgment?

MR. GRIFFINGER: Yes, sir.

THE COURT: And has not raised the question which I [10] just raised?

MR. GRIFFINGER: That is correct.

THE COURT: All right.

MR. GRIFFINGER: Thank you, Judge.

THE COURT: Anybody else? Mr. Satz? Mr. Satz?

MR. SATZ: No, sir.

THE COURT: Mr. Durkin?

MR. DURKIN: No, sir.

MR. QUIRK: I should point out just one thing, your Honor, that there's a slight variation between the judgments that your Honor has before him and the amount that Mr. Kaps has found, and the difference is 2,397.92, and that was a shortcoming in my affidavit, I had neglected to subtract from my fees an award of damages that Charles Unanue had to pay during the trial, he paid some attorneys fees and I had not given him credit for that in my affidavit, but he has credit for that as of today.

THE COURT: So the correct number is that set out in your form of judgment?

MR. QUIRK: Yes, sir.

THE COURT: That's $6,890,820.07?

MR. QUIRK: Yes, sir.

THE COURT: Mr. Kaps' final report ends up with $6,893,217.99.

MR. QUIRK: Yes, sir.

THE COURT: Mr. Kaps, I read your report and your [11] submissions, anything that you would like to add that you feel is appropriate to add?

MR. KAPS: No, your Honor.

THE COURT: The Rule, Rule 441, running from 441-1 through 441-5 sets out the procedure in matters of this kind, it calls for the submission of a report from the master providing copies thereof to all interested parties and all parties having an opportunity to comment on or raise objections to the report, after which the Court, in the language of Rule 441-5(b), the Court may adopt the report, modify it or reject it in part or in whole, receive further evidence or re-commit it with institutions.

I am satisfied that the report is sound in all respects, it's well considered, I'm satisfied that its conclusions are correct, appropriate and, accordingly, I accept the report in its entirety.

I have considered the objections submitted by Charles Unanue. I really—the objections are submitted by a letter dated February 15 and another dated February 17—I really find them to be without merit. Much of the objections are really covered and dealt with in the prior order that I entered in which I found that Mr. Unanue was, indeed, liable for counsel fees under Section 8.—8.01 of the agreement in question. That was my initial determination on November 19, 1993, and, thereafter, my appointment of Mr. Kaps as Special Master on April 19, 1994.

[12] The remainder of the objections deal mostly with whether Mr. Unanue should or should not be a party to this matter, whether he should have or should not have participated in the matter. I will say only that I tried in every way I could, and by using as broad and permissive language as I could to enable and, indeed, encourage Mr. Unanue—when I say "Mr. Unanue" I mean, of course, Charles Unanue—to encourage and enable Mr. Unanue and/or the trustee in bankruptcy to participate in this matter in whatever way either of them thought appropriate. I tried to make clear that I would not even consider precluding Charles Unanue from participating on some kind of contention that the bankruptcy was the proper party or vice versa; either one of them were welcomed and encouraged to participate and submit whatever they deemed appropriate to the master.

They appeared—or Mr. Charles Unanue, rather, appeared at an initial confeernce and thereafter declined to patricipate the remainder of the proceeding.

As I have indicated, I'm satisfied that Mr. Kaps considered the matter thoroughly, I've read the transcripts of his proceedings, I think his final conclusion that all of the fees and the hours spent, the time involved and the numbers involved were appropriate, is amply justified by the record. I'm aware, of course, that the fees are, to say the least, very large, it is for that reason that I referred the matter to Mr. Kaps for the kind of hearing and the kind of detailed treatment that ——— would [13] be difficult and time consuming for me to spend on the matter.

I understand the disappointment of Skadden Arps with a 25 percent reduction, but I think that, too, is a sound conclusion, and since there is no formal objection put forth on that basis I will, once again, as I have said, accept Mr. Kaps' report in its entirety.

I will accept Mr. Griffinger's explanation as to why the judgment covers both Charles Unanue and the trust—and the bankruptcy estate, it's an anomalous unclear situation; and as I thought of the problem and how one could handle it I readily confess I could not come up with a more rational approach than that which Mr. Griffinger described a few moments ago.

Now, I will state on the record that I could see a rationale for deleting the reference to the trustee or the bankruptcy estate; and certainly should the Bankruptcy Court or any other court at some later date conclude that the judgment should be reformed or revised in some way to take account of or eliminate the apparent duplicity—not duplicity, but duplication, that would not upset me at all. It's clear, of course, that there is only one debt being imposed, and there's certainly no basis for duplicating it by charging Mr. Unanue and the bankruptcy estate or bankrupt estate.

I will not allow prejudgment interest. I understand that there's a rationale for that and I understand that it is within my discretion, and I've read all of those cases any number of [14] times in other matters; given the magnitude of what we're talking about, close to $7,000,000 in counsel fees and related expenses, and given that none of this has really come into clear focus until, first, I determined that there was responsibility for counsel fees, and now we have the amount fixed, my conclusion is that I should exercise that discretion in favor of declining to award any prejudgment interest, so I will do that.

Now, I am satisfied that Charles Unanue should be responsible for one-half of Mr. Kaps' fees, I've read the bills submitted by him and I'm satisfied that the fee is, indeed, reasonable in view, again, of the enormity of the

amount of money involved and, also, the time obviously spent on the matter. So that a fee of $17,284.90, including disbursements, is reasonable and I will approve that.

Certainly it was my intention from the beginning that each side be responsible for one-half of those fees. I put the onus for the entire debt on the plaintiffs only because it seemed almost certain that collecting one half of that from Charles Unanue was going to be very difficult and may ultimately be unsuccessful, I did not want to have Mr. Kaps in that position and, therefore, I put the initial onus or responsibility on the entities represented by counsel here today, but there's no reason in the world why Charles Unanue should not be responsible for half of that. And so that a provision determining that Charles is responsible for one half of that amount to Goya Foods, Inc. is [15] proper.

Now, the fact that the judgment reads in favor of Goya Foods, Inc. rather than the beneficiaries or the trustees of the trust, would you explain that to me, please, Mr. Griffinger?

MR. GRIFFINGER: Yes. Your Honor was previously entered partial judgments with respect to liability of Charles Unanue, so the only remaining issue is the quantum of damages, so there are extant orders in the form of partial judgments previously entered by your Honor—

THE COURT: No, I meant why is it in favor of Goya Foods as opposed to the other claimants, the trusts, the beneficiaries, the trustees, et cetera.

MR. GRIFFINGER: I'm sorry. To refresh your Honor's recollection, Goya Foods, Inc. was the payor of all of the bills of all counsel because, pursuant to a corporate resolution which we had previously submitted to your Honor, that it was deemed to be in the best interests of the corporation.

THE COURT: That's what I assumed. And is that also true, I take it, that Goya Foods, Inc. has paid that 17,$000 item to Mr. Kaps?

MR. GRIFFINGER: Yes, your Honor, they were submitted to counsel and we forwarded them to Goya Foods who cut a check and I forwarded those checks to Mr. Kaps.

THE COURT: Okay. Is there anything else that anybody has to say?

[16] All right. I will—and I have deleted the paragraph providing for the prejudgment interest. The submission, I've corrected the submission of the amount to be reimbursed for one half of Mr. Kaps' fees and I have inserted the sum of $8,642.45, and with that I've signed the judgment and I'll date it today which is, what, 23?

MR. QUIRK: 23, your Honor.

MR. GRIFFINGER: The 23rd, your Honor.

THE COURT: Unless there's anything else—

MR. GRIFFINGER: Case closed.

THE COURT: All right, fine.

MR. GRIFFINGER: Thank you.

THE COURT: Does this mean I can close my file when I get the motion?

MR. GRIFFINGER: Yes, sir. Can we wait for a conformed copy?

THE COURT: Yes. Off the record.

(Proceeding concluded)

[Filed Feb. 23, 1995]

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIV.: BERGEN COUNTY

Docket No. M-128817

Civil Action

In the Matter of the Settlement of the Accounts of JOSEPH UNANUE and FRANK UNANUE, Trustees Under the Trust Agreement Dated November 16, 1970, as Amended, By and Among PRUDENCIO UNANUE, as Grantor, and PRUDENCIO UNANUE, JOSEPH UNANUE and ANTHONY UNANUE, as Trustees of Sixteen Trusts Thereunder.

FINAL JUDGMENT

This matter having been opened before the Court on the joint application of the Trustees, the Beneficiaries, the guardian *a dlitem* for Jorge Unanue, and Goya Foods, Inc. (the "Moving Parties"), for the entry of a Judgment awarding liquidated damages pursuant to § 8.01 of Amendment dated July 31, 1974 to Agreement dated June 9, 1972 for Sale of Interests of Charles Unanue in Goya Foods, Inc. and Affiliated Companies (the "1974 Amendment") or as otherwise provided by that contract or by law, and a hearing having been held before the Court on January 28, 1994 with the attorneys for all the Moving Parties appearing (Quirk & Gallagher, attorneys for the Trustees, by N. Patrick Quirk, Esq.; Crummy, Del Deo, Dolan, Griffinger & Vecchione, A Professional Corporation, attorneys for the Beneficiaries, by Michael R. Griffinger, Esq.; Durkin & Boggia, Esqs., guardian *ad*

litem for Jorge Unanue, by Martin T. Durkin, Esq.; Saiber Schlesinger Satz & Goldstein, attorneys for Goya Foods, Inc., by David M. Satz, Jr., Esq.), and Charles Unanue appearing; and a further hearing having been held before the Court on March 28, 1994 with the attorneys for all the Moving Parties appearing (Quirk & Gallagher by N. Patrick Quirk, Esq.; Crummy, Del Deo, Dolan, Griffinger & Vecchione by Michael R. Griffinger, Esq.; Durkin & Boggia by Martin T. Durkin, Esq.; Saiber Schlesinger Satz & Goldstein by Robin Horn, Esq.), and Charles Unanue appearing via telephone from Puerto Rico, and Gerardo A. Quiros-Lopez, Esq., trustee of the bankruptcy estate of Charles Unanue, appearing via telephone from Puerto Rico; and a hearing on the amount of damages to be awarded to the Moving Parties having been held on August 24, 1994 before Warren J. Kaps, Esq., the Special Master appointed by the Court in accordance with the diretcions and procedures of this Court as set forth in its Judgment and Reference to Special Master dated April 19, 1994, with the attorneys for all the Moving Parties appearing (Quirk & Gallagher by N. Patrick Quirk, Esq.; Crummy, Del Deo, Dolan, Griffinger & Vecchione by Michael R. Griffinger, Esq.; Durkin & Boggia by Martin T. Durkin, Esq.; Saiber Schlesinger Satz & Goldstein by David M. Satz, Jr., Esq.), and the Special Master, having considered the documentary and testimonial evidence presented and the papers submitted to him, and having rendered his report and recommendation to the Court regarding the amount of damages to be awarded to the Moving Parties pursuant to § 8.01 of the 1974 Amendment, and the Court having heard and considered oral argument, and having read and considered all the papers and exhibits submitted;

IT IS on this 23d day of February, 1995:

ORDERED, ADJUDGED and DECREED that Final Judgment be entered on all matters in dispute in the within matter and that the provisions of the Judgment and

Reference to Special Master dated April 19, 1994 are hereby incorporated herein by reference; and it is further

ORDERED, ADJUDGED and DECREED that Charles Unanue and the bankruptcy estate of Charles Unanue are found to be liable to Goya Foods, Inc. in the sum of $6,890,820.07 as damages pursuant to § 8.01 of the 1974 Amendment, and that judgment be and hereby is entered accordingly; and it is further

ORDERED, ADJUDGED and DECREED that Charles Unanue and the bankruptcy estate of Charles Unanue are found to be liable to Goya Foods, Inc. in the sum of $8,647.45 as the share of the fees of the Special Master allocable to Charles Unanue and the bankruptcy estate of Charles Unanue, and that judgment be and hereby is entered accordingly.

/s/ Arthur J. Lesemann
ARTHUR J. LESEMANN
J.S.C.

——Opposed

——Unopposed

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIV.: BERGEN COUNTY

Docket No. M-128817

Civil Action

In the Matter of the Settlement of the Accounts of JOSEPH UNANUE and FRANK UNANUE, Trustees Under the Trust Agreement Dated November 16, 1970, as Amended, By and Among PRUDENCIO UNANUE, as Grantor, and PRUDENCIO UNANUE, JOSEPH UNANUE and ANTHONY UNANUE, as Trustees of Sixteen Trusts Thereunder.

JUDGMENT AND REFERENCE TO SPECIAL MASTER

This matter having been opened before the Court on the joint application of the Trustees, the Beneficiaries, the guardian *ad litem* for Jorge Unanue, and Goya Foods, Inc. (the "moving parties"), for the entry of a Judgment awarding damages pursuant to § 8.01 of the Amendment dated July 31, 1974 to Agreement dated June 9, 1972 for Sale of Interests of Charles Unanue in Goya Foods, Inc. and Affiliated Companies (the "1974 Amendment") or as otherwise provided by that contract or by law, and a hearing having been held before the Court on January 28, 1994 with the attorneys for all the moving parties appearing, to wit, Quirk & Gallagher, attorneys for the Trustees (N. Patrick Quirk, Esq., appearing); Crummy, Del Deo. Dolan, Griffinger & Vecchione, A Professional Corporation, attorneys for the Beneficiaries (Michael R. Griffinger, Esq., appearing); Durkin & Boggia, Esq., guardian *ad litem* for Jorge Unanue (Martin T. Durkin,

Esq., appearing); Saiber Schlesinger Satz & Goldstein, attorneys for Goya Foods, Inc. (David M. Satz, Jr., Esq., appearing), and Charles Unanue appearing; and a further hearing having been held before the Court on March 28, 1994 with the attorneys for all the moving parties appearing, to wit, Quirk & Gallagher, attorneys for the Trustees (N. Patrick Quirk, Esq., appearing); Crummy, Del Deo, Dolan, Griffinger & Vecchione, A Professional Corporation, attorneys for the Beneficiaries (Michael R. Griffinger, Esq., appearing); Durkin & Boggia, Esqs., guardian *ad litem* for Jorge Unanue (Martin T. Durkin, Esq., appearing); Saiber Schlesinger Satz & Goldstein, attorneys for Goya Foods, Inc. (Robin Horn, Esq., appearing), Charles Unanue appearing via telephone, and Gerardo A. Quiros-Lopez, Esq., Trustee of the bankruptcy estate of Charles Unanue appearing via telephone; and the Court having heard and considered oral argument, and having read and considered all the papers and exhibits submitted; and having rendered its opinion on the record setting forth its findings of fact and conclusions of law;

IT IS on this 19th day of April, 1994:

ORDERED, ADJUDGED and DECREED that the joint application of the moving parties for the entry of a Judgment awarding damages—*i.e.*, the sum of their out-of-pocket costs and expenses of litigation, including, but not limited to witness fees and reasonable attorneys' fees and disbursements—pursuant to § 8.01 of the 1974 Amendment, be and hereby is granted as set forth on the record on March 28, 1994 and herein, based upon the Court's determination that

- the within litigation is a "suit, action or proceeding" as contemplated by § 8.01 of the 1974 Amendment;
- each of the moving parties has standing to seek and recover damages under § 8.01 of the 1974 Amendment;

- the within litigation involves "some other signatory" to the 1974 Amendment, *i.e.*, Charles Unanue;
- the moving parties have been "successful," and Charles Unanue is the losing party, on all substantive issue before this Court;

and it is

FURTHER ORDERED, ADJUDGED and DECREED that the joint application of the moving parties for damages pursuant to § 8.01 to the extent of twice their out-of-pocket costs and expenses, rather than single damages, be and hereby is denied; provided, however, that this ruling shall in no way be construed to be a determination that any other portion of § 8.01 is invalid; and § 8.01 is hereby modified to limit it to single damages; and it is

FURTHER ORDERED, ADJUDGED and DECREED that, pursuant to R. 4:41-1 of the N.J. Court Rules and with the approval of the Honorable Peter Ciolino, A.J.S.C., the amount of damages to be awarded to the moving parties pursuant to this Judgment shall be heard and reported on to this Court by a Special Master specifically appointed for such purpose; and it is

FURTHER ORDERED, ADJUDGED and DECREED that the Court hereby appoints Warren J. Kaps, Esq., to serve as such Special Master; and it is

FURTHER ORDERED, ADJUDGED and DECREED that the duty of the Special Master shall be to expeditiously determine the reasonableness of the attorneys' fees and other costs incurred in this matter. In connection with such determination, the Special Master

- may permit such relevant discovery as he deems reasonable and necessary;
- may take such testimony as he deems reasonable and necessary;

- shall, in the first instance, make all interlocutory decisions regarding the conduct of the proceedings, including legal and other issues which may arise, seeking guidance from the Court with respect to any such decision if he deems necessary;
- shall report to this Court as to the amount that he determines should be reasonably awarded to the moving parties, as well as the reasons for such determinations;

and it is

FURTHER ORDERED, ADJUDGED and DECREED that, following the rendering of the Special Master's report, the Court will fix a schedule for, hear and rule upon any objections to such report and fix the amount to be awarded in accordance with this Judgment; and it is

FURTHER ORDERED, ADJUDGED and DECREED that the moving parties initially shall be responsible for payment for the services rendered by the Special Master, although the moving parties may apply for some or all of the amounts so expended to be paid by Charles Unanue or the bankruptcy estate of Charles Unanue at such time as the Special Master renders his report; and it is

FURTHER ORDERED, ADJUDGED and DECREED that the Court shall ultimately determine the reasonableness of the fees charged by the Special Master and the timing of and manner in which they shall be paid.

/s/ Arthur J. Lesemann
ARTHUR J. LESEMANN
J.S.C.

——Opposed

——Unopposed

[Filed Nov. 16, 1993]

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIV.: BERGEN COUNTY

Docket No. M-128817

Civil Action

In the Matter of the Settlement of the Accounts of JOSEPH UNANUE and FRANK UNANUE, Trustees Under the Trust Agreement Dated November 16, 1970, as Amended, By and Among PRUDENCIO UNANUE, as Grantor, and PRUDENCIO UNANUE, JOSEPH UNANUE and ANTHONY UNANUE, as Trustees of Sixteen Trusts Thereunder.

ORDER

This matter having been opened before the Court on the joint application of the Trustees, the Beneficiaries, the guardian *ad litem* for Jorje Unanue, and Goya Foods, Inc., and the Court having directed the submissions of all interested parties in accordance with its Order dated October 15, 1993, and a hearing having been held before the Court on November 19, 1993 with the attorneys for all parties to this action appearing, to wit, Quirk & Gallagher, attorneys for the Trustees (N. Patrick Quirk, Esq., appearing); Crummy, Del. Deo, Dolan, Griffinger & Vecchione, A Professional Corporation, attorneys for the Beneficiaries (Michael R. Griffinger, Esq., appearing); Durgin & Boggia, Esqs., guardian *ad litem* for Jorje Unanue (Martin T. Durkin, Esq., appearing); Saiber Schlesinger Satz & Goldstein, attorneys for Goya Foods, Inc. (David M. Satz, Jr., Esq., appearing); and Charles

Unanue appearing pro se; and the Court having heard and considered oral argument, and having read and considered all the papers and exhibits submitted:

IT IS on this 19th day of Nov., 1993:

ORDERED, that the Second Aecounting of Joseph Unanue and Frank Unanue, Trustees under the Trust Agreement dated November 16, 1970, as submitted with the Verified Complaint and as supplemented and amended through and including June 30, 1993, be and hereby is approved as filed; and it is

FURTHER ORDERED, that this Court finds, determines and declares that Charles Unanue and the bankruptcy estate of Charles Unanue, each had and has no right whatsoever to receive any asset from Prudencio Unanue's estate or from the Trust created by Prudencio Unanue on November 16, 1970, or from any of the follow-on trusts created under said Trust; it being specifically found that the fifty-three (53) shares of Goya Foods, Inc. stock placed into said Trust by Prudencio Unanue and administered under the Trust Agreement were solely the property of Prudencio Unanue and were properly included in the Trust and that Charles Unanue and the bankruptcy estate of Charles Unanue have no interest therein, direct or indirect; and it is

FURTHER ORDERED, that the final paragraph of this Court's Order of December 7, 1987 and paragraph 5 of this Court's Order of January 4, 1988 are hereby vacated; and it is

FURTHER ORDERED, that the Trustees are hereby expressly authorized and directed to distribute forthwith from the follow-on trusts the property interests of each Beneficiary in each such trust to such Beneficiaries as have attained the age of twenty-five (25) years; and it is

FURTHER ORDERED, that on Charles Unanue's Amended Counterclaim against Joseph Unanue, Frank

Unanue *et al.*, as corrected by letter dated January 5, 1990, judgment be and hereby is entered in favor of the counterclaim defendants and against Charles Unanue on the merits of said Counterclaim; and it is

FURTHER ORDERED, that this Court finds, determines and declares that the contract known as the Amendment dated July 31, 1974 to Agreement dated June 9, 1972 for Sale of Interests of Charles Unanue in Goya Foods, Inc. and Affiliated Companies," and each and every provision thereof, was and is valid and enforceable and that Charles Unanue and the bankruptcy estate of Charles Unanue each are bound thereby; and it is

FURTHER ORDERED, that this Court finds, determines and declares that the contract known as the "Agreement dated June 9, 1972 for Sale of Interests of Charles Unanue in Goya Foods, Inc. and Affiliated Companies" (except insofar as it was expressly modified or superseded by the 1974 Amendment), and each and every provision thereof, was and is valid and enforceable and that Charles Unanue and the bankruptcy estate of Charles Unanue each are bound thereby; and it is

FURTHER ORDERED, that this Court finds, determines and declares that Charles Unanue has materially breached and continues in material breach of the 1974 Amendment by reason of his violations of Sections 6.02, 6.03, 6.04 and 6.08 thereof in this action and in other litigation, and the Court reserves jurisdiction for the purposes of determining the appropriate remedy or remedies for Charles Unanue's breach of contract; and it is

FURTHER ORDERED, that Charles Unanue's Cross-Motion dated November 8, 1993 for the relief requested therein be and it hereby is denied in its entirety; and it is

FURTHER ORDERED, that on defendant Charles Unanue's Counterclaim against Goya Foods, Inc. *et al.* judgment be and it hereby is entered in favor of the

counterclaim defendants and against Charles Unanue on the merits of said Counterclaim.

/s/ Arthur J. Lesemann
ARTHUR J. LESEMANN
J.S.C.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: BERGEN COUNTY

Docket No. M-128817

Civil Action

In the Matter of the Settlement of the Accounts of JOSEPH UNANUE and FRANK UNANUE, Trustees Under the Trust Agreement Dated November 16, 1970, as Amended, By and Among PRUDENCIO UNANUE, as Grantor, and PRUDENCIO UNANUE, JOSEPH UNANUE and ANTHONY UNANUE, as Trustees of Sixteen Trusts Thereunder.

INTERLOCUTORY ORDER

THIS MATTER having been tried without a jury in the prescence of the attorneys on the attached list, and for the reasons expressed in the written opinion of this date.

IT IS on this 4th day of December, 1991,

ORDERED ADJUDGED AND DECLARED that:

1. Prudencio Unanue's domicile on November 16, 1970, the date of his *inter vivos* trust, and March 17, 1976, the date of his death, was in New Jersey, not Puerto Rico.

2. This matter is transferred to Judge Arthur Lasemann, J.S.C., for disposition of the remaining issues in the case.

/s/ Martin J. Kole
MARTIN J. KOLE
J.A.D., t/a

Supreme Court, U.S.
FILED
MAR 8 1999
CLERK

No. 98-1231

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

THE BANKRUPTCY ESTATE OF ULPIANO UNANUE-CASAL, a/k/a CHARLES UNANUE,

Petitioner,

v.

GOYA FOODS, INC., JOSEPH A. UNANUE, FRANK UNANUE, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Should the New Jersey courts' determination that Petitioner's father was domiciled in New Jersey for state-law inheritance purposes when he died in 1976 be overridden by 48 U.S.C. § 733a, a statute enacted in 1927 to govern citizenship of Puerto Rico, where the statute has never been construed as Petitioner seeks to interpret it, and has never been relied upon in *any* reported federal decision since its adoption 72 years ago?

2. Did the Full Faith and Credit Clause forbid the New Jersey courts from applying New Jersey law in adjudicating rights to a New Jersey trust, created by a New Jersey domiciliary, containing stock located in New Jersey that conferred ownership of a corporation headquartered in New Jersey?

3. Was Petitioner denied "notice and an opportunity to be heard" in connection with a summary judgment motion where the issue raised by the motion had been present in the case since the complaint was filed six years earlier, and the court accorded Petitioner the opportunity to brief, submit evidence on, and orally argue the summary judgment motion before deciding it?

PARTIES TO THE PROCEEDING

The parties to the proceeding below were Charles Unanue (also known as Ulpiano Unanue-Casal), Petitioner herein,* and the following parties who are named as Respondents in this Court: Goya Foods, Inc. ("Goya"), Joseph A. Unanue, and Frank J. Unanue, together with Carol Ann Unanue-Freeborg, C. Jeffrey Unanue, Robert I. Unanue, Mary Ellen (Unanue) Yorio, C. Randall Unanue, Joseph F. Unanue,** Thomas Unanue, Mary Carmen (Unanue) Norris, Mary Ann (Unanue) Quiñones, Mary Louise (Unanue) Guggenheim, Theresa Elizabeth Devir, Francisco R. Unanue, Mary Isabel (Unanue) McVicar, Carlos Unanue, Anne Marie Unanue, Peter Unanue, Andrew Unanue, and Jorge Unanue (collectively, the "Beneficiary Respondents"). This Brief in Opposition is filed on behalf of all Respondents except C. Jeffrey Unanue.

STATEMENT PURSUANT TO RULE 29.6

Pursuant to Rule 29.6 of the Rules of this Court, Respondents state that the corporate Respondent, Goya, does not have any parent corporations, and that Cardet Wholesale Foods, Inc. is Goya's only nonwholly-owned subsidiary.

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* Although the Petition in this case has purportedly been filed by "the Bankruptcy Estate of Ulpiano Unanue-Casal, a/k/a Charles Unanue," no such entity has existed since Petitioner's bankruptcy case was dismissed on September 12, 1995. (*See infra*, text at 2, 9-10)

** Joseph F. Unanue died on November 28, 1998.

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Order of the Superior Court of New Jersey, Law Division, Bergen County, Probate Part, dated December 7, 1997 Confirming Its Jurisdiction over All Disputes Concerning Prudencio Unanue's Estate and Trust . 1a

Order of the United States Court of Appeals for the First Circuit dated November 16, 1993 Denying Petitioner's Motion for a Stay of New Jersey Proceedings Pending Appeal 3a

Opinion and Order of the United States Bankruptcy Court for the District of Puerto Rico dated September 12, 1995 Dismissing Petitioner's Chapter 7 Bankruptcy Case 6a

Respondents respectfully submit this Brief in Opposition to the Petition for a Writ of Certiorari to the Supreme Court of the State of New Jersey.

OPINIONS BELOW

The opinions and orders below are cited in the Petition (Pet. 1-2) and reprinted in the Appendix to the Petition. An additional relevant order of the Superior Court of the State of New Jersey, Bergen County, Law Division, Probate Part, dated December 7, 1987, is unreported and is reprinted in the Appendix hereto. (*See infra* at 1a-2a)

STATEMENT OF JURISDICTION

The Petition in this case fails to properly invoke the jurisdiction of this Court. Petitioner cites 28 U.S.C. § 1254(1) as the basis for jurisdiction in this case (Pet. 3), but that statute confers certiorari jurisdiction upon this Court to review only decisions of the United States Courts of Appeals, and is inapplicable to this case in which Petitioner seeks review of a judgment and underlying orders of the New Jersey state courts. If this Court has jurisdiction, it is pursuant to 28 U.S.C. § 1257(a), which is not invoked as a basis for jurisdiction in the Petition. In any case, as discussed below in the Reasons for Denying the Writ, many of Petitioner's arguments relate principally to state-law issues and state-court factual and procedural determinations, which this Court does not sit to review.

PRELIMINARY STATEMENT

This Petition represents the culmination of a bitter intra-family dispute that has resulted in prolonged litigation between

Petitioner, Charles Unanue,[1] and numerous other Unanue family members over the past 30 years. The case principally involves Petitioner's claim that he is entitled to inherit certain assets from his father, who died in 1976. After eleven years of proceedings beginning in 1987, the New Jersey courts have decisively rejected Petitioner's state-law inheritance claim, as well as his related attempt to set aside two contracts that Petitioner and several family-owned companies had executed in 1972 and 1974 to settle prior litigation. Petitioner now seeks to transform this state-law dispute into a case raising federal issues, but in fact this case involves no colorable issues of federal law at all, much less unsettled and important issues that could warrant this Court's review. Accordingly, the writ should be denied.[2]

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1. The Petition identifies "the Bankruptcy Estate of Ulpiano Unanue-Casal, a/k/a Charles Unanue" as the Petitioner. However, as Charles Unanue advised a lower court in 1995, "[o]n September 12, 1995, the Bankruptcy Court for the District of Puerto Rico *dismissed* Charles Unanue's bankruptcy petition without prejudice. As a result, all property of the bankruptcy estate, including the [bankruptcy] Trustee's Appeal, was *revested in Charles Unanue* [individually] pursuant to 11 U.S.C. § 349(b)(3)." (Certification of Jan Alan Brody, Esq., dated Dec. 21, 1995, at 2; emphasis added) Thus, the bankruptcy estate *ceased to exist* three and one-half years ago and cannot even nominally be a party to litigation, and Respondents are at a loss to understand why it has now been resurrected as a "petitioner" in this Court. If the Petition is cognizable at all under these circumstances — which Respondents submit it is not — it must be regarded as having been filed by Charles Unanue, who will accordingly be referred to as Petitioner.

2. In addition to this Petition filed by his long-time counsel, Petitioner *pro se* has filed a second petition (No. 98-1250) to review the same judgment below. As was noted by the Appellate Division of the New Jersey Superior Court, Petitioner's "filing of separate appeals by the same party from the same final judgment is an obvious, untenable, and intolerable violation of the overriding policy of judicial

(Cont'd)

COUNTERSTATEMENT OF THE CASE[3]

Petitioner's father, Prudencio Unanue ("Prudencio"), was the founder of Goya Foods, Inc. ("Goya"). Beginning in 1929, Prudencio lived and was domiciled in the State of New Jersey. (*See* Pet. 4a-7a, 14a-127a, 222a) As the courts below found, Prudencio continuously maintained his New Jersey domicile until his death, at age 89, in 1976. (*Id.*)

The Goya business was established in New York City during the 1930's, and moved to New Jersey in 1974. (*See* Pet. 39a-40a) Prudencio owned a substantial block of Goya stock, which in 1970 he placed in an *inter vivos* trust (the "Trust"), governed by New Jersey law, for the ultimate benefit of his 18 grandchildren. (*See* Pet. 5a, 100a)

Between 1969 and 1974, Petitioner was engaged in prior litigation with Goya, its affiliates, and the members of his

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(Cont'd)
administration that litigation be conducted expeditiously, economically, and efficiently." (Pet. 10a-11a) Petitioner's pattern of misconduct such as the filing of these duplicative submissions, thereby burdening the Court and evading Rule 33.1(g)(1) governing the length of petitions for certiorari, in and of itself warrants the denial of both petitions.

3. The Statement of the Case contained in the Petition (Pet. 5-13) contains vitriolic allegations of wrongdoing, by Respondents and others, extending as far back as 1969. Virtually none of these allegations are supported by citation to the record below, and many are directly contrary to the detailed findings of fact reached by the state courts. No effort is made in this Brief in Opposition to respond to all of Petitioner's factual allegations, which are almost entirely irrelevant to the question of whether certiorari should be granted. The fact that Respondents have confined their Brief in Opposition to relevant matters should in no event be deemed an admission that any of Petitioner's other allegations are accurate.

family. The parties resolved that litigation in two settlement contracts, known as the "1972 Agreement" and the "1974 Amendment," under which Petitioner relinquished his ownership in Goya and its affiliates in return for more than $4.3 million in cash. In the 1974 Amendment, Petitioner agreed, *inter alia*, that he would never assert that he was entitled to an ownership interest in Goya, or seek an inheritance from his father's assets. The parties (including Petitioner) expressly agreed that both the 1972 Agreement and 1974 Amendment would be "construed and governed in accordance with the laws of the State of New York." (*See* Pet. 170a)

Upon Prudencio's death in 1976, his will was probated without objection in New Jersey, and the Trust continued to be administered there. Prudencio's estate plan was unchallenged for 11 years after his death, but in 1987, Petitioner suddenly reappeared and demanded "his share" of the Goya stock contained in the Trust, in violation of the 1974 Amendment, purportedly on the basis that Prudencio had supposedly been domiciled in Puerto Rico rather than New Jersey and was subject to the "forced heirship" and community-property laws of that jurisdiction.

To resolve the uncertainty created by Petitioner's belated demand for an inheritance, on August 13, 1987, Respondents commenced a declaratory judgment action against Petitioner in the Superior Court of New Jersey, where Petitioner's estate and the Trust had been administered over the preceding decade. The complaint sought, *inter alia*, a determination that Petitioner had no right to any assets contained in Prudencio's estate or the Trust, both because Prudencio had been domiciled in New Jersey and because, in any event, the 1974 Amendment barred Petitioner from asserting any inheritance claim. On December 7, 1987, the New Jersey court entered an order confirming its jurisdiction over the controversy, determining that it had and

would exercise jurisdiction to adjudicate all claims by anyone (including Petitioner) to assets of either Prudencio's estate or the Trust, including any disputes concerning the applicable law governing such claims. (Order of Dec. 7, 1987, at 2; *infra* at 1a-2a)

The New Jersey court decided that it would first address the question of Prudencio's domicile, which could be dispositive of the remaining issues. Despite innumerable attempts by Petitioner to obstruct or delay the proceedings,[4] discovery on the domicile issue (including 35 depositions) was concluded and the case readied for trial. Between July 1989 and September 1990, the New Jersey Superior Court conducted a 171-day trial on Prudencio's domicile, involving a wide-ranging inquiry in which the parties explored virtually every facet of Prudencio's life and family history.

As the domicile trial in New Jersey was concluding, Petitioner filed a voluntary bankruptcy case dated August 29, 1990 in the United States Bankruptcy Court in Puerto Rico. This filing automatically stayed the New Jersey action under 11 U.S.C. § 362, but the Bankruptcy Court modified the stay to permit adjudication of the domicile issue. Thereupon, on

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4. Some of Petitioner's more egregious tactics prior to the New Jersey trial are described in the opinions in *Unanue-Casal v. Unanue-Casal*, 898 F.2d 839 (1st Cir. 1990) (Breyer, C.J.) (affirming reprimand of Petitioner under Fed. R. Civ. P. 11 for frivolous attempt to "remove" the two-year-old case from New Jersey state court to federal court in Puerto Rico on the morning trial was set to begin, because "there [was] good reason to believe that Charles filed the removal petitions for 'an improper purpose,' namely, to harass, or to delay the start of the New Jersey trial"); *Unanue-Casal v. Unanue-Casal*, 132 F.R.D. 146 (D.N.J. 1989) (imposing monetary sanction of $16,000 against Petitioner for similar removal attempt in New Jersey, and cataloguing some of Petitioner's other misconduct to date), *aff'd*, 914 F.2d 244 (3d Cir. 1990).

December 4, 1991, the New Jersey Superior Court ruled, in a 147-page opinion, that Prudencio was domiciled in New Jersey at all relevant times, up through and including his date of death in 1976. (Pet. 14a-127a, 222a) In determining that Prudencio was domiciled in New Jersey, the trial court's opinion observed that Prudencio had become a New Jersey domiciliary when he initially moved from New York to New Jersey in 1929, and that Prudencio had always retained that domicile for the remaining 47 years of his life. In particular, the court found that while Prudencio had undisputedly spent the final five years of his life in Puerto Rico before he died in 1976, his extended stay in that location resulted from a series of debilitating medical problems that began while Prudencio happened to be in Puerto Rico for his annual winter visit, at the age of 84, and continued for the remainder of his life. Under well-settled law, the court held, this involuntary stay in Puerto Rico did not represent a change of Prudencio's domicile. (Pet. 61a)[5]

After the domicile opinion was issued, Respondents sought and ultimately obtained further relief from the automatic

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5. Although the Petition fails even to *mention* that Prudencio was gravely ill throughout the final years of his life, the trial court's opinion contains extensive discussion of Prudencio's medical problems during these years. (*See* Pet. 51a-61a, 104a-109a) During this period, Prudencio was in his late 80's, generally confined to a small apartment, receiving around-the-clock nursing care, compelled to wear a urethral catheter, and suffering from uremia, prostate cancer, heart disease, arthritis, at least one severe stroke that impacted his ability to walk and speak, and a series of ischemic attacks following the stroke. As the trial court found, "Prudencio's confinement to Puerto Rico by reason of ill health from January 1971 until his death on March 17, 1976, at 90 years of age, *was involuntary, was never intended to be permanent, and cannot be considered a change of domicile* to Puerto Rico from New Jersey." (Pet. 61a; emphasis added) Given these findings, the Petition's reference to "Prudencio's unquestioned and uninterrupted freely chosen residence in Puerto Rico" (Pet. 10) is grossly inaccurate.

bankruptcy stay so that the New Jersey proceedings could be completed and Petitioner's claims finally resolved. *See Unanue-Casal v. Unanue-Casal* (*In re Unanue-Casal*), 159 B.R. 90 (D.P.R. 1993), *aff'd mem.*, 23 F.3d 365 (table), 1994 WL 179925 (1st Cir. 1994). With that relief granted, on October 15, 1993, Respondents moved in the New Jersey action for summary judgment on the remaining issues. In particular, Respondents moved, *inter alia*, for "a declaratory judgment that Charles Unanue has no rights to receive any assets from . . . the *inter vivos* trust created on November 16, 1970." (Notice of Motion dated Oct. 15, 1993, at ¶ 2) The New Jersey court authorized and invited Petitioner individually, his bankruptcy trustee (who had become a nominal party to the action), and/or the New Jersey attorney who had represented both of them for many years (who is also Petitioner's counsel of record herein), to appear before it, jointly or separately, and to present whatever evidence and arguments they wished in opposition to Respondents' motion.[6]

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6. Petitioner observes that the bankruptcy trustee did not appear during this phase of the proceedings and implies that this resulted in some unfairness to him. (*See* Pet. 11) In truth, it was Petitioner whose own attempt to obstruct the proceedings blocked the trustee from hiring counsel. The "bankruptcy estate" had previously been represented in New Jersey (and was later represented in the appellate courts) by the same attorney who represented Petitioner individually (and is Petitioner's counsel of record herein). However, Petitioner instructed that attorney not to appear in response to Respondents' summary judgment motion, and instead appeared *pro se*. During this period, as the First Circuit Court of Appeals held in denying a motion by Petitioner to stay the New Jersey action, "the record strongly suggest[ed] that the movant has been manipulating the bankruptcy process to avoid determination of the merits of the underlying dispute." (*See infra* at 4a) The First Circuit further noted:

> Movant's contention that his interests will not be represented in the New Jersey action because the bankruptcy trustee is unwilling or unable to appear is without merit.

(Cont'd)

On November 19, 1993, after all parties (including Petitioner) had briefed and orally argued all aspects of Respondents' motion for summary judgment, the New Jersey trial court granted that motion in all respects and held, *inter alia*, that Petitioner had no right to inherit any assets from either Prudencio's estate or the Trust. (Pet. 166a-180a) In reaching this conclusion, the court noted that Petitioner's inheritance claims were based solely on legal concepts from Puerto Rico (such as "forced heirship" and "conjugal partnerships") that were simply inapplicable given the prior determination that Prudencio was domiciled in New Jersey and not in Puerto Rico. (*See id.*) The court also upheld the validity of the 1974 Amendment, which Petitioner also challenged under Puerto Rico law, holding that there was no reason to disregard the parties' (including Petitioner's) express choice of New York law to govern that agreement. (Pet. 170a-172a)

Subsequently, on March 28, 1994, the New Jersey court granted a motion by Respondents for an award of their reasonable attorneys' fees and expenses incurred in their litigation with Petitioner, as authorized by an express provision of the 1974 settlement contract. (Pet. 181a-194a, 214a-221a) After a hearing before a special master regarding the amount of fees to be awarded, the New Jersey court entered a final money judgment, dated February 23, 1995, payable by Charles Unanue and his bankruptcy estate. (Pet. 200a-213a)

(Cont'd)

> The New Jersey court has indicated that it would permit movant to appear on his own behalf. As the district court wrote, and as the record amply supports, movant "has demonstrated no problems hiring numerous lawyers and law firms for all of his suits."

(*Id.* at n.1)

Petitioner appealed the trial court determinations to the Appellate Division of the New Jersey Superior Court. While that appeal was pending, on September 12, 1995, the Bankruptcy Court in Puerto Rico granted a motion by the bankruptcy trustee to dismiss Petitioner's bankruptcy case "for cause" under 11 U.S.C. § 707(a), without granting him a discharge. (*See infra* at 6a-10a) In dismissing Petitioner's bankruptcy case, the Bankruptcy Court noted, *inter alia*, the absence of creditors other than those involved in "the family dispute" pending in New Jersey. (*Id.* at 9a & n.3) The Bankruptcy Court also took note of a series of prior findings by the United States District Court, in its "relief from stay" and related decisions, that Petitioner's bankruptcy filing was a "sham," filed "in bad faith" as "a ruse designed to frustrate the legitimate rights of his adversaries." (*Id.* at 9a-10a & n.4)[7] Upon this dismissal of the bankruptcy case (which was not appealed), the nominal "bankruptcy estate of Charles Unanue" ceased to exist, and all assets and liabilities of the estate reverted to debtor Charles Unanue pursuant to 11 U.S.C. § 349(b). Petitioner's counsel acknowledged, at that time, that upon such dismissal "all property of the bankruptcy estate . . . was revested

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7. *See Unanue-Casal v. Unanue-Casal*, 159 B.R. 90, 99-102 (D.P.R. 1993), *aff'd mem.*, 23 F.3d 395 (table), 1994 WL 179925 (1st Cir. 1994); *Goya Foods, Inc. v. Unanue-Casal*, 164 B.R. 216, 217 (D.P.R. 1993), *aff'd mem.*, 32 F.3d 561 (table), 1994 WL 408070 (1st Cir. 1994), *cert. denied*, 513 U.S. 1149 (1995). The Bankruptcy Court's and District Court's conclusion that Petitioner's "no asset" bankruptcy case was fraudulent proved correct: In 1997, after a ten-day bench trial, the United States District Court for the District of Puerto Rico found that in order to conceal assets from creditors, over a period of many years Petitioner had fraudulently hidden his assets (including valuable real estate in Puerto Rico, New York, Spain and France) in the name of his wife as well as an *alter ego* dummy Panamanian corporation whose owner was found to be a "fictional character." *See Goya Foods, Inc. v. Unanue-Casal*, 982 F. Supp. 103 (D.P.R. 1997), *appeals docketed*, Nos. 98-1553, 98-1554 (1st Cir. 1998).

in Charles Unanue pursuant to 11 U.S.C. § 349(b)(3)." (Certification of Jan Alan Brody dated Dec. 21, 1995, at 2)

On May 19, 1998, after considering lengthy briefs and oral arguments submitted by all parties including Petitioner, the Appellate Division of the New Jersey Superior Court affirmed the trial court's judgment and all the orders appealed from. *Matter of Unanue*, 311 N.J. Super. 589, 710 A.2d 1036 (App. Div. 1998) (Pet. 3a-11a). The appellate court's opinion addressed various state-law inheritance, contract and procedural issues raised by Petitioner in his appellate briefs, while holding all of Petitioner's remaining claims that it had not expressly addressed to be "without merit." (Pet. 10a) On July 16, 1998, the Appellate Division denied Petitioner's motions for reconsideration. (Pet. 12a-13a) On November 2, 1998, the New Jersey Supreme Court denied Petitioner's applications for certification to review the Appellate Division judgment (Pet. 1a-2a), and on February 1, 1999, Petitioner filed this petition for certiorari (together with his unauthorized, duplicative *pro se* submission in No. 98-1250).[8] For the reasons stated below, the requested writ should be denied.

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8. The Petition requests that this Court issue a writ of certiorari addressed to the Supreme Court of New Jersey, but that court's only action in this case was to deny discretionary review, and it never entered any judgment that could be subject to review by this Court. The highest state court that actually rendered a reviewable decision in this case is the New Jersey Superior Court, Appellate Division, and it is to that Court that the writ should be addressed in the highly unlikely event that one were to issue. *See* Robert L. Stern, Eugene Gressman *et al.*, Supreme Court Practice 326 (7th ed. 1993).

REASONS FOR DENYING THE WRIT

I.

THE NEW JERSEY COURTS PROPERLY APPLIED NEW JERSEY STATE LAW TO THE INHERITANCE DISPUTE BEFORE THEM

A. The Statute Cited By Petitioner Does Not Control Prudencio Unanue's Domicile, And Raises No Important Federal Issue

After an extended trial, the New Jersey courts held that Prudencio was domiciled in New Jersey (*see* Pet. 7a, 14a-127a, 222a), with the result that New Jersey law (rather than the Puerto Rico legal concepts invoked by Petitioner) was applied in resolving the conflicting claims to inherit assets from Prudencio's estate and the Trust. As the Appellate Division of New Jersey Superior Court held, "[t]he voluminous record amply supports [the trial judge's] findings on which he based his conclusion that Prudencio's domicile . . . remained in New Jersey." (Pet. 7a) This determination of a decedent's domicile for inheritance purposes, under governing state law, raises no federal question for this Court. *See, e.g.*, *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945) (this Court lacks jurisdiction to review state-court determinations of state-law issues).

In attempting to transform this bitterly fought, but analytically straightforward, inheritance dispute into a federal case, the Petition relies almost exclusively upon a federal statute adopted in 1927, which provides that "[a]ll citizens of the United States who . . . reside in the island [of Puerto Rico] for one year shall be citizens of Puerto Rico." 48 U.S.C. § 733a. Petitioner's argument is that because this statute refers to persons who "*reside* in" Puerto Rico for one year, rather than

those who "are domiciled in" Puerto Rico, Congress must have intended to enact a rule under which Prudencio's mere *physical presence* in Puerto Rico for more than one year as the result of illness transformed him into a "citizen" (and hence domiciliary) of Puerto Rico. (*See* Pet. 14-16) In truth, however, it is readily apparent that this statute must be understood to require one year of *domicile* — not mere "residence" — in Puerto Rico to establish "citizenship" there.

In asking this Court to grant certiorari to construe 48 U.S.C. § 733a and apply it to the unusual facts of this case, Petitioner has failed to identify a single important issue that would warrant this Court's attention. Petitioner does not and cannot allege that the holdings of the courts below — which found his § 733a argument unworthy of serious discussion and rejected it as "of no relevance" (Pet. 90a) and "without merit" (*see* Pet. 10a) — created a conflict of lower-court decisions that could justify certiorari under this Court's Rule 10(b). To the contrary, § 733a has apparently never been the subject of substantive attention in *any* reported federal or state-court case; and while the statute has been addressed in several opinions of the Supreme Court of Puerto Rico, that court has consistently *rejected* interpretations such as Petitioner's, and held that "*citizenship of Puerto Rico is predicated on domicile in Puerto Rico*. Under [§ 733a and other statutes], the 'residence' which makes a person a citizen of Puerto Rico *is equivalent to domicile*." *Buscaglia v. Tax Court*, 68 P.R.R. 322, 325-26 (1948) (emphasis added). *Accord, e.g., Fiddler v. Secretary of the Treasury*, 85 P.R.R. 302, 309 (1962) ("[C]itizenship of Puerto Rico is predicated on domicile in Puerto Rico. *However, in order that this domicile may exist residence in Puerto Rico is required for a period of not less than one year*.") (emphasis in original); *Buscaglia v. Tax Court*, 69 P.R.R. 844, 847 (1949); *Lókpez v. Fernández*, 61 P.R.R. 503, 515 (1943) ("We are only citizens of Puerto Rico in the sense that we are residents of Puerto Rico,

the word resident here meaning domiciled."). Petitioner conspicuously ignores these decisions — which, as he conceded in the court below, are directly contrary to his position — even though they appear to represent the *only* authority construing the statute upon which his entire argument rests.

Nor has any "important question of federal law that . . . should be settled by this Court" (*see* Sup. Ct. R. 10(c)) arisen from a statute that has required no federal judicial attention in the 72 years since its enactment during the Coolidge Administration. Petitioner does not suggest that a ruling on the § 733a issue he raises would ever be likely to affect anyone at all other than himself and the Unanue family members whose inheritance he seeks to usurp, and the Petition certainly fails to explain why certiorari should be granted to address an issue that is unlikely ever to recur in any other case. *See, e.g.*, *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 122 (1994) (per curiam).

A grant of certiorari on the § 733a issue would be particularly unwarranted because Petitioner's proposed interpretation of the statute is untenable on its face. Petitioner reasons that because § 733a refers to persons who "reside in [Puerto Rico] for one year," Congress must have intended to make Puerto Rico citizenship dependent upon presence alone, without regard to the "objective manifestation of intent to make one's abode in that jurisdiction for an indefinite period of time" (Pet. 15 n.4) that Petitioner admits is ordinarily a *sine qua non* of a change of domicile. (*See* Pet. 14-17) Thus, according to the Petition, Prudencio *involuntarily* became a Puerto Rico domiciliary when he spent more than one year there — notwithstanding the findings below that Prudencio always desired and intended to retain and return to his home in New Jersey and that he remained in Puerto Rico during his final years *solely* because grave illnesses rendered it impracticable for him to travel — and Prudencio thereby lost his long-held

New Jersey domicile and his right to dispose of his assets as he saw fit under that state's laws. (*See supra* at 6 & n.5)[9]

As noted above, the Puerto Rico Supreme Court decisions that are the only authority to have addressed § 733a have categorically rejected any such interpretation. Beyond that, the Petition ignores the fact that while judicial decisions frequently recognize the distinction between "domicile" and mere "residence" that Petitioner adduces (*see* Pet. 15 n.4), in *statutes* the words "reside" or "residence" are used far more often than "domicile," and are most often used to mean domicile. This was certainly the case in 1927, the time when § 733a was enacted, which is of course the "most relevant time for determining a statutory term's meaning." *MCI Telecommunications Corp. v. AT&T Co.*, 512 U.S. 218, 228 (1994). As observed by a leading treatise of that era:

> *The term "residence" . . . is the wording commonly used in statutes.* Indeed the American decisions involving domicile are largely based on statutes where the word "residence" is used. . . . While broad generalizations must be indulged in with caution, it

9. Petitioner concedes, as he must, that "the settled concept of domicile . . . requires the intention to continue residing [in a location] for an indefinite period." (Pet. 14 n.3) This is true in New Jersey (*see* Pet. 31a-34a, 61a-63a (citing cases)) and in every other state, as well as in those federal contexts in which this Court has been called upon to define domicile. *See, e.g.*, *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48 (1989); *Williamson v. Osenton*, 232 U.S. 619, 624-25 (1914); *Mitchell v. United States*, 88 U.S. (21 Wall.) 350, 353 (1874). Under this definition, and as the New Jersey courts found, Prudencio's stay in Puerto Rico solely as the result of health problems did not affect his New Jersey domicile. *Cf. State of Texas v. State of Florida*, 306 U.S. 398, 427 (1939) (residence in location for a "special purpose," such as "obedience to the demands of health," does not change domicile).

> seems safe to say that *residence as a statutory term generally means domicile.*

Herbert F. Goodrich, *Handbook on the Conflict of Laws* 26-27 (1st ed. 1927) (emphasis added); *accord, e.g.*, Willis L.M. Reese & Robert S. Green, *That Elusive Word, "Residence"*, 6 Vand. L. Rev. 561 (1953). Indeed, by 1927, it had long been "well settled that residence as used in statutes defining political rights is synonymous with domicile." *Delaware, Lackawanna & W. R.R. Co. v. Petrowsky*, 250 Fed. 554, 560 (2d Cir.), *cert. denied*, 247 U.S. 508 (1918). As § 733a, in identifying the "citizens of Puerto Rico," unquestionably "defin[ed] political rights," the phrase "reside in the island for one year" must be understood to mean "are domiciled in the island for one year" — just as the Supreme Court of Puerto Rico has always understood it — and Petitioner's statutory argument collapses completely.[10]

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10. Thus interpreted (as it has consistently been by the Puerto Rico Supreme Court), § 733a states that "all citizens of the United States who . . . [are domiciled] in the island for one year shall be citizens of Puerto Rico." Read in this fashion, § 733a simply established a one-year *durational residency requirement* for the exercise in Puerto Rico of citizenship rights such as voting. Such requirements were commonly found throughout the country during the 1920's and for many years afterwards, *see Dunn v. Blumstein*, 405 U.S. 330, 333 n.3 (1972) (citing cases from 12 states); K.K. Kennan, *A Treatise on Residence and Domicile* 890-918 (1934) (quoting voter statutes from *every* state), and were universally interpreted to require domicile (and not merely a period of physical presence) in the jurisdiction for the designated period of time. *See, e.g., McGrath v. Kristensen*, 340 U.S. 162, 174 (1950) (noting that in statutes defining voter qualifications, the term "residence" "equals domicile"); *In re McLauchlan*, 1 F.2d 5, 6 (1st Cir. 1924); *United States ex rel. Devenuto v. Curran*, 299 Fed. 206, 211 (2d Cir. 1924); Joseph H. Beale, *Residence and Domicil*, 4 Iowa Law Bull. 3, 5 (1918) ("residence as a qualification for voting means domicil"; citing cases from 12 states); Restatement of Conflict of Laws § 9 cmt. e (1934) ("In statutes relating to . . . voting, residence means domicile unless the contrary is indicated in the statute"). Innumerable other citations could be offered.

Interpreting § 733a as requiring one year of *domicile* (not mere "residence" or presence) in Puerto Rico to establish Puerto Rico citizenship is also strongly supported by this Court's rulings construing Section 1 of the Fourteenth Amendment, which defines *state* citizenship by declaring that "[a]ll persons born or naturalized in the United States . . . are citizens of the United States and of the state wherein they *reside*." (Emphasis added) Although the Amendment defines a state's citizens as all American citizens who "reside" (not "are domiciled") in that state, this Court held without difficulty that state citizenship requires not mere physical presence or "reside[nce]" in the state but also the intent to remain there permanently or indefinitely, *i.e.*, to establish a domicile there. *E.g.*, *Robertson v. Cease*, 97 U.S. 646, 650 (1878) (Harlan, J.); *Steigleder v. McQuesten*, 198 U.S. 141, 143 (1905) (despite Fourteenth Amendment's use of word "reside," "a mere averment of residence in a particular State is not an averment of citizenship in that State"); *see Poulos v. Naas Foods, Inc.*, 959 F.2d 69, 70 n.1 (7th Cir. 1992).

Thus, the interpretation of § 733a implicitly adopted by the courts below gives the statute a plain meaning consistent with the common understanding of the statutory language, represents the only plausible explanation of congressional intent, accords with the only caselaw on point, and produces an entirely just result in this case. By contrast, Petitioner's proposed interpretation of § 733a is unsupported and Petitioner has offered no evidence or reason to believe that Congress adopted it.[11] Significantly, if Petitioner were correct that the

11. Petitioner's reliance on snippets he excerpts from the drafting history of § 733a is entirely misplaced. (*See* Pet. 14-15) Because the plain meaning of § 733a is clear given all the considerations set forth in the text, the statute cannot be considered truly ambiguous so as to require resort to legislative history. In any event, Petitioner's speculation regarding why the words "are permanently domiciled" in a prior draft (Cont'd)

test for Puerto Rico citizenship under § 733a excluded the element of intention, then Congress enacted a test for domicile in Puerto Rico that would differ from the standard applied under federal law and in every state, and that test could preempt the domicile law of every state (and of Puerto Rico itself, *see* 1 L.P.R.A. § 8(7)) in cases like this one. (*See* Pet. 13-16) Petitioner has suggested no reason why Congress should have desired either to create a unique test of domicile for Puerto Rico or to preempt state law with such a definition. *See Elkins v. Moreno*, 435 U.S. 647, 662 n.16 (1978) ("[T]he question of who can become a domiciliary of a State is one in which state governments have the highest interest. Many issues of state law may turn on the definition of 'domicile.' . . ."); *Third Nat'l Bank v. Impac Ltd.*, 432 U.S. 312, 323 (1977) (where a party "completely fails to identify any national or local interests which [his proposed] reading of the statute would serve," that interpretation is unlikely to be correct). Because Petitioner's proposed interpretation of § 733a is manifestly incorrect, and because in any case the issue he raises is of no general importance, the Petition raises no issue worthy of certiorari and should be denied.

(Cont'd)
of the statute were changed to "reside" in the final version ignores the explanation that Congress actually provided. The committee report on the bill that became § 733a indicates that the precise wording of the provision was chosen simply to be "identical with that enacted some years ago for Hawaii" (which was the only other insular territory whose people were American citizens at that time). S. Rep. No. 69-1011 at 2 (June 7, 1926). The drafters' goal of achieving uniformity in parallel statutes governing the different territories cannot possibly bear the weight placed upon it by Petitioner.

B. The New Jersey Courts Properly Applied New Jersey Law To This Controversy Involving New Jersey Assets Of A New Jersey Citizen

Petitioner asserts that "the real determination of consequence in this matter is whether Prudencio [was] a citizen of Puerto Rico," rather than of New Jersey, when he died in 1976. (Pet. 16) Based entirely on his contention that his father was a "citizen of Puerto Rico" under 48 U.S.C. § 733a, Petitioner then asserts that the New Jersey courts violated the Full Faith and Credit Clause of the Constitution (and/or its implementing statute, 28 U.S.C. § 1738), by applying New Jersey state law rather than Puerto Rico law in rejecting Petitioner's inheritance claims. (*See* Pet. 17-23) As shown above, however, Prudencio was a domiciliary and citizen of New Jersey, not of Puerto Rico, and in any event there is no reason for this Court to grant certiorari on that issue.

Because Petitioner cannot overcome the findings below that Prudencio was domiciled in New Jersey, his full faith and credit argument based entirely on the assumption of Prudencio's Puerto Rico citizenship also fails and need not be addressed further. Even apart from this threshold difficulty, this argument is meritless on its face.

It should be noted at the outset that no special analysis, for full faith and credit purposes, is required because Petitioner relies on the law of the Commonwealth of Puerto Rico rather than of a state. Respondents fully agree with Petitioner that Puerto Rico's laws and judicial decisions are entitled to the same recognition, under the Full Faith and Credit Clause and/or under § 1738, as if Puerto Rico were a state of the Union. (*See* Pet. 19-20) This proposition is well established and entirely uncontroversial. On the other hand, there is no merit to or support for Petitioner's suggestion that statutes adopted by the

Puerto Rico Legislature are entitled to "supremacy [as] results of the exercise of federal legislative power" (Pet. 17), which would accord Puerto Rico's legislation *greater* standing than if Puerto Rico were a state. *See Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 499 (1988) (for Supremacy Clause purposes, Puerto Rico laws are treated "the same as . . . the law of a State"). Because these relevant principles are not in genuine dispute, this case involves no novel or significant questions concerning the judicial or political status of Puerto Rico. Rather, Petitioner's invocation of Puerto Rico law is properly analyzed in exactly the same fashion as if Petitioner were attempting to invoke the law of New York or California or any other state.[12]

The Petition asserts that New Jersey was constitutionally required to "give Full Faith and Credit to the Acts of Puerto Rico governing 'family rights and obligations. . . .' " (Pet. 20) Of course, one can imagine circumstances under which New Jersey courts would be called upon to apply the laws of another jurisdiction, such as Puerto Rico, to a case before them. Whether "New Jersey [is] obligated . . . to give effect to the Civil Code of Puerto Rico," as the Petition states the question (Pet. i), cannot be answered in the abstract. Rather, the question presented is whether full faith and credit principles obliged New Jersey to adjudicate *this dispute* under the laws of another jurisdiction rather than give effect to its own laws and public policy. The answer is no.

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12. This case involves issues of full faith and credit allegedly owed only to Puerto Rico's "laws (legislative measures and common law)," and does not involve the far more "exacting" deference that would be owed to a *judgment* of the courts of a sister jurisdiction in related litigation. *See Baker v. General Motors Corp.*, 118 S. Ct. 657, 663-64 (1998) (distinguishing between these two separate applications of the Full Faith and Credit Clause).

This Court has emphasized that "[t]he Full Faith and Credit Clause does not compel 'a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.' " *Baker v. General Motors Corp.*, 118 S. Ct. 657, 663 (1998) (quoting *Pacific Employees Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 501 (1939)); *accord Sun Oil Co. v. Wortman*, 486 U.S. 717, 722 (1988); *Nevada v. Hall*, 440 U.S. 410, 421 (1979) ("the Full Faith and Credit Clause does not require a State to apply another State's law in violation of its own legitimate public policy"). Rather, because this Court has emphatically declined to "embark upon the enterprise of constitutionalizing choice-of-law rules," *Sun Oil*, 486 U.S. at 728-29, the Constitution intervenes only in "limited situations," *Nevada v. Hall*, 440 U.S. at 422, to require that to apply its law a forum state must have "a significant contact or significant aggregation of contacts [with a controversy], creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818-19, 821-822 (1985); *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981).

The Petition makes no effort to establish that applying New Jersey law to govern this case violated these limited constitutional criteria for evaluating state-court choice-of-law decisions. None of the controlling cases such as *Allstate Insurance*, *Phillips Petroleum* and *Sun Oil* are cited in the Petition (nor in Petitioner's papers below, which barely, if at all, preserved the constitutional claim he now seeks to present). Petitioner's reticence is understandable, because recasting his constitutional claim in the language of those cases reveals it as simply frivolous.

The New Jersey courts applied New Jersey law in deciding the inheritance dispute in this case after determining that (i)

the decedent, Prudencio, was domiciled in New Jersey at the time of his death and had been a New Jersey domiciliary for the preceding 47 years, (ii) the assets to be distributed were contained in a Trust that was governed by New Jersey law and supervised by a New Jersey court, and (iii) these assets consisted of stock that was located in New Jersey and represented ownership of a corporation headquartered in New Jersey. Under these circumstances, any contention that New Jersey was not "competent to legislate" with regard to this dispute, or that New Jersey lacked a "significant aggregation of contacts" with it, or that the choice of New Jersey law to resolve it was "arbitrary and fundamentally unfair," would be meritless on its face.[13]

Indeed, New Jersey's uncontroverted contacts with this controversy — including the presence within the state of the Goya stock that constituted the Trust assets as well as Goya itself, Prudencio's selection of New Jersey law to govern his estate plan, and the New Jersey residence of several of the Beneficiary Respondents whose inheritance Petitioner seeks to usurp (and whose existence the Petition studiously ignores) —

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13. It should be noted that the choice-of-law rules the New Jersey courts applied in this case are entirely within the mainstream of American conflicts law, and resemble those that are routinely applied by *every* jurisdiction in the United States (including Puerto Rico). For example, with respect to Petitioner's claim to inherit assets from his father, the New Jersey courts applied the "familiar principle . . . that normally it's [the] law of the place where one is domiciled at the time of death [that] governs his will." (Pet. 169a; *see also* Pet. 7a) In the same vein, Petitioner's claim that his mother had a "conjugal partnership" interest in Prudencio's assets, was addressed under the nationally accepted, "well-settled conflicts-of-law principle that the law of the place of the domicile of the acquiring spouse at the time of the acquisition governs the determination of whether the acquired property is separate or community [property]." (Pet. 8a; *see also* Pet. 173a) *Cf.*, *e.g.*, Restatement (Second) of Conflict of Laws §§ 258, 263 (1971).

were sufficiently robust that New Jersey would have been constitutionally authorized to exercise jurisdiction and apply its law to the distribution of Prudencio's property *irrespective* of Prudencio's domicile. *See, e.g.*, *Shaffer v. Heitner*, 433 U.S. 186, 207-08 (1977) (each state has jurisdiction to adjudicate claims to assets located within that state); *Direction der Disconto-Gesellschaft v. United States Steel Corp.*, 267 U.S. 22, 28 (1925) (Holmes, J.) (location of stock within jurisdiction justified application of that jurisdiction's law to determine ownership, because "the question who is the owner of the paper depends upon the law of the place where the paper is"). Hence, even if Prudencio had not been a domiciliary of New Jersey at all relevant times (which he was), Petitioner's full faith and credit argument would still lack merit.[14]

Finally, Petitioner's objection to New Jersey's application of New York law to uphold the 1972 Agreement and 1974 Amendment (Pet. 21-22), is equally without substance. As noted above, those two contracts *expressly provided* that they were to be "construed and governed in accordance with the laws of the State of New York." (*See* Pet. 170a) In and of itself, the contractual agreement of all parties, *including Petitioner*, that the courts would apply New York law to resolve any dispute under the contracts vitiates any claim that it was "arbitrary [or] fundamentally unfair" for the New Jersey courts to do precisely that.

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14. Petitioner's repeated contention that the Appellate Division manifested New Jersey's disregard for full faith and credit principles by observing that New Jersey does not "recognize" community property or conjugal partnerships is also frivolous. (*See* Pet. 11, 13, 20, *citing* Pet. 8a) Read in context, the opinion simply states that *New Jersey's internal law* does not include these concepts. This indisputably true statement cannot reasonably be read to suggest that New Jersey ignores its full faith and credit obligations or would not apply foreign law if genuinely called upon to do so. New Jersey has a well-developed body of conflict-of-laws jurisprudence demonstrating precisely the opposite.

Because Petitioner's full faith and credit arguments are facially meritless, ignore this Court's precedents, and raise no issue likely to recur, they do not warrant certiorari.

II.

PETITIONER'S DUE PROCESS CLAIM IS MERITLESS

Point II of the Petition presents a highly factbound argument that Petitioner's Fourteenth Amendment due process rights were violated because the New Jersey courts supposedly "undertook to enter a judgment declaring that [Petitioner] was not entitled to any inheritance from [his mother] Carolina's estate" (Pet. 24), although that claim supposedly was not before the New Jersey courts. (*See* Pet. 23-27) In essence, Petitioner asks whether the wording of the pleadings and other documents filed in the New Jersey action, over the course of eleven years of complicated litigation, was sufficiently clear to place Petitioner on notice that the issues before the court included his own contention that Prudencio's property was owned by a "conjugal partnership" created under Puerto Rico law (*i.e.*, that Prudencio's wife Carolina was entitled to 50% ownership of the assets upon his death).

To adjudicate this due process claim, the Court would be called upon to parse all the pleadings, motion papers, briefs, and court orders filed in years of litigation before the New Jersey courts, so as to determine whether Petitioner was on adequate notice that a particular issue was to be adjudicated. This endeavor, which would create no broader precedent at all, is not an appropriate role for this Court, and does not warrant certiorari. *See* Sup. Ct. R. 10; *Rudolph v. United States*, 370 U.S. 269, 270 (1962) (per curiam) (Supreme Court does not review matters whose resolution "would be of no importance

save to the litigants themselves"). Moreover, Petitioner's argument that his due-process rights were somehow violated by alleged pleading or notice deficiencies is, regrettably, based upon repeated distortions of the proceedings in the courts below, and is entirely refuted by an accurate recitation of the relevant procedural history.

Respondents commenced the New Jersey action in 1987, for the purpose of obtaining the complete resolution of the controversy created when Petitioner belatedly demanded an inheritance from Prudencio, who had died more than 11 years earlier. To that end, the Complaint sought a declaratory judgment that Petitioner was barred from "asserting *any claims whatsoever* against the estate or property of Prudencio Unanue or the Trusts established by Prudencio Unanue." (Complaint at 18; emphasis added) This request was intended to be, and was, broad enough to result in a judgment conclusive with respect to *any claim* that Petitioner was entitled to inherit or receive Trust assets.

On December 7, 1987, after extensive briefing and argument on jurisdictional issues by all parties including Petitioner, the New Jersey trial court entered an order (which Petitioner does not challenge) holding that it had jurisdiction over the subject-matter of the controversy and over all persons (including Petitioner) who might assert claims to assets of either Prudencio's estate or the Trust. Among other issues, the New Jersey court asserted its jurisdiction over "all claims or issues respecting the applicable law which shall govern the said Estate or the said Trust (whether the law of New Jersey or Puerto Rico or any other jurisdiction)." (*See infra* at 2a)

Thereafter, Petitioner filed Counterclaims (December 1987) and an Amended Counterclaim (July 1988) in the New Jersey action, which explicitly asserted, *inter alia*, that

Petitioner was entitled to share in the Trust assets, even though Prudencio had bequeathed him nothing. One of Petitioner's theories was that the Goya stock in Prudencio's name was actually owned by a "conjugal partnership" between Prudencio and Prudencio's wife Carolina, pursuant to supposedly applicable Puerto Rico law, so that Carolina held a 50% interest in these assets.[15] In its December 1991 domicile opinion, the New Jersey trial court noted that this claim by Petitioner was pending, but did not yet resolve it. (*See* Pet. 16a & n.1) The United States District Court in Puerto Rico, in its August 1993 opinion lifting the automatic stay of the New Jersey action, similarly noted that this issue was pending and awaiting resolution in New Jersey. *See Unanue-Casal v. Unanue-Casal*, 159 B.R. at 93. Contrary to his present contention, Petitioner could not have been surprised when this precise issue was ultimately the subject of a motion before, and ruling by, the New Jersey court.

On October 15, 1993, pursuant to a schedule the New Jersey court had fixed at a status conference the previous month, Respondents moved for summary judgment on all issues remaining in the New Jersey action. The motion sought relief consonant with the relief Respondents had demanded in their Complaint filed six years before, including "a declaratory judgment that Charles Unanue has no rights to receive any assets from . . . the *inter vivos* trust created on November 16, 1970." (Notice of Motion dated Oct. 15, 1993, at ¶ 2) Respondents' summary judgment motion was accompanied by a brief which, *inter alia*, addressed Petitioner's claim that he was entitled to Trust assets based on his "conjugal partnership" theory, thus placing Petitioner fully on notice that this issue was before the New Jersey court. Indeed, Petitioner discussed this issue at

15. Petitioner asserted this claim although Carolina, who survived Prudencio by more than eight years before dying in 1984, had never made such a claim, and in fact had signed a *release* of Prudencio's estate broad enough to encompass any such claim. (*See* Pet. 169a-170a)

length in his brief in opposition to summary judgment, as well as at a lengthy oral argument held on November 19, 1993. (*See* Pet. 143a-164a) His arguments were duly considered by the trial court, but rejected on their merits. (Pet. 166a-175a) Petitioner had a further opportunity to present his contentions to the Appellate Division, which, after full briefing and argument, again disagreed with Petitioner's contentions and affirmed the judgment for Respondents. (Pet. 6a)[16]

Under these circumstances, Petitioner's due process claim is entirely without substance. At all stages of the proceedings, throughout the litigation and particularly when presented with Respondents' summary judgment motion, Petitioner knew precisely what issues were before the New Jersey courts and he knew, well in advance, when he would have an opportunity to address them. Petitioner's reliance on *Fuentes v. Shevin*, 407 U.S. 67 (1972) (Pet. 24), which invalidated replevin statutes that authorized *ex parte* seizures of property without notice, hearings, or judicial proceedings of any kind (*see id.* at 73-78), is wholly misplaced in this case where Petitioner received in ample measure the notice and opportunity to be heard "at a meaningful time" that are the hallmarks of due process of law.

---

16. Petitioner repeatedly mischaracterizes the determination that Respondents sought and obtained from the New Jersey courts as a declaration "that Charles was not entitled to any inheritance from Carolina's estate." (Pet. 24; *see also* Pet. i, 3, 10-11, 23) In repeatedly making this claim, Petitioner never cites the opinions below or any other documents from New Jersey litigation to support his contention that the New Jersey courts adjudicated Petitioner's right to inherit from "Carolina's estate." Rather, the New Jersey courts determined who was entitled to the assets that *Prudencio* had placed in the Trust, necessarily and in the process confirming that Prudencio had been the sole owner of the property (and that Carolina or a "conjugal partnership" had not). Thus, the Goya stock held by Prudencio never became part of "Carolina's estate," and Petitioner's assertions about his alleged right to inherit from that estate are irrelevant.

See id. at 80-87. "Due process" (and then some) was assuredly accorded to all parties during the *eleven years* this family dispute was before the New Jersey courts, and the record certainly does not reflect any systematic error calculated to recur in other cases unless reviewed and corrected by this Court.[17] Certiorari should, therefore, be denied.

---

17. Petitioner's remaining arguments that the state court erred in granting summary judgment on state-law claims, and thereby denied him due process, are frivolous candidates for this Court's review. (*See* Pet. 24-25) Petitioner's unsupported suggestions that additional discovery should have been allowed, and there was insufficient "competent evidentiary proof" to warrant summary judgment, do not raise federal issues, and Petitioner offers no authority to suggest that they do.

CONCLUSION

For all the reasons stated above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, BERGEN COUNTY, PROBATE PART, DATED DECEMBER 7, 1997 CONFIRMING ITS JURISDICTION OVER ALL DISPUTES CONCERNING PRUDENCIO UNANUE'S ESTATE AND TRUST-

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
BERGEN COUNTY
PROBATE PART

DOCKET NO. [M-128817]

In the Matter of the Settlement of the Accounts of JOSEPH UNANUE and FRANK UNANUE, Trustees Under the Trust Agreement dated November 16, 1970, as amended, by and among PRUDENCIO UNANUE, as Grantor, and PRUDENCIO UNANUE, JOSEPH UNANUE and ANTHONY UNANUE, as Trustees of Sixteen Trusts thereunder.

ORDER

This matter being opened to the court upon the application of Crummy, Del Deo, Dolan, Griffinger & Vecchione, a Professional Corporation, attorneys for certain beneficiaries, and the court having considered the arguments of counsel, the papers submitted in support of and in opposition to said motion, and having further considered all pleadings on file in this matter, and the court having found (1) that it has, and has had, exclusive and continuing subject matter jurisdiction over the Estate and Trust of Prudencio Unanue and all matters concerning or pertaining thereto, including any and all claims to any interest in the res of said Trust; and (2) that in order to protect and maintain jurisdiction, the court must preserve the res within the State of New Jersey, and further, resolve all disputes

concerning said Trust and Estate by whomever raised; and for good cause shown; and for the reasons set out in the court's oral opinion delivered this day in open court,

IT IS, on this 7th day of December, 1987,

ORDERED, that this court hereby finds that it has subject matter jurisdiction over both the Trust and the Estate, and consistent therewith it also has personal jurisdiction over all parties claiming any interest in either the Trust or the Estate, including Charles Unanue, for the purpose of determining the interest of any such person in the said Trust or the said Estate; and it is further

ORDERED, this court finds that any and all claims or issues respecting the domicile of Prudencio Unanue at or prior to his death, and any and all claims or issues respecting the applicable law which shall govern the said Estate or the said Trust (whether the law of New Jersey or Puerto Rico or any other jurisdiction) should be tried and argued in this Court and this court is found to be the appropriate tribunal in which such issues shall be tried and argued and resolved; and it is further

ORDERED, that unless and until this court determines that the Estate or the Trust should be administered in some other jurisdiction, this court shall administer and retain exclusive jurisdiction over the Estate and the Trust and any accountings, distributions or claims with respect thereto; and it is further

ORDERED, that until final resolution of this proceeding, or further order of the court, the Trustees of the said Trust are restrained and enjoined from removing the Trust Res or any of the assets of the Trust from the jurisdiction of the State of New Jersey.

[signed]
Arthur J. Lesemann, J.S.C.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED NOVEMBER 16, 1993 DENYING PETITIONER'S MOTION FOR A STAY OF NEW JERSEY PROCEEDINGS PENDING APPEAL

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NO. 93-2186

JOSEPH A. UNANUE, *et al.*,

Appellees,

v.

ULPIANO UNANUE-CASAL a/k/a CHARLES UNANUE,

Appellant.

Before Breyer, *Chief Judge*,
Selya and Cyr, *Circuit Judges*.

ORDER OF COURT

Entered November 16, 1993

Movant-appellant Ulpiano Unanue-Casal moves for a stay pending appeal, pursuant to Fed. R. App. P. 8, of the district court order lifting the stay on proceedings in the New Jersey Superior Court. We deny the motion.

First, for the reasons stated by the district court in its opinion dated August 3, 1993, movant has not established a

sufficient likelihood of success on the merits. Movant's contention that the district court erred in not remanding the case to the bankruptcy court after it had found that appellees had met their *prima facie* burden of proof is not convincing. Before making its decision concerning the lifting of the stay in the New Jersey action, the bankruptcy court had already decided that the only evidence that the movant proffered at the bankruptcy hearing was irrelevant. Since all relevant evidence was before both the bankruptcy and the district courts, a remand would serve no useful purpose. We also note that the record strongly suggests that the movant has been manipulating the bankruptcy process to avoid determination of the merits of the underlying dispute. *Cf. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 814 F.2d 844, 847 (1st Cir. 1987) (affirming decision granting relief from automatic stay without any testimonial hearing on ground that debtor was misusing bankruptcy protection to avoid decision on merits of dispute).

Second, movant has failed to establish that he would suffer any irreparable harm if the stay is not granted. Denial of the stay would only allow the New Jersey action to proceed.[1] Movant has a right to participate in that action and to avail himself of the state appellate process should he so choose. Being required to litigate in state court rather than bankruptcy court does not constitute irreparable harm. *In re Thomases*, 28 B.R. 961, 962-63 (Bankr. S.D.N.Y. 1983). Nor is the fact that movant's appeal in this court may be mooted by the New Jersey action a basis for a stay without a showing that a stay is otherwise appropriate. *See Ramsdell v. G.H. Coffey Co.*, 632

1. Movant's contention that his interests will not be represented in the New Jersey action because the bankruptcy trustee is unwilling or unable to appear is without merit. The New Jersey court has indicated that it would permit movant to appear on his own behalf. As the district court wrote, and as the record amply supports, movant "has demonstrated no problems hiring numerous lawyers and law firms for all his suits."

F.2d 162 (1st Cir. 1980) (denying stay pending appeal, even though case may become moot, since there was no other showing of entitlement to extraordinary relief). Movant has made no such showing here.

Movant's request for oral argument is denied. Movant's request for a stay pending appeal is *denied*.

By the Court:

[signed]
Clerk

OPINION AND ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF PUERTO RICO DATED SEPTEMBER 12, 1995 DISMISSING PETITIONER'S CHAPTER 7 BANKRUPTCY CASE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF PUERTO RICO

CASE NO. 90-04490 (SEK)

Chapter 7

IN THE MATTER OF:

ULPIANO UNANUE-CASAL a/k/a
CHARLES UNANUE,

DEBTOR

OPINION AND ORDER

We must decide whether to grant the Trustee's request for a dismissal of this case opposed by the Debtor.

A review of the events which lead to the Trustee's request shows the following. The controversies pending in this case were consolidated and litigated under adversary proceeding number 91-0099. In this adversary proceeding we bifurcated the issues, denied Plaintiffs' motions for abstention and scheduled the bifurcated issue for trial commencing on May 17, 1994. In the meantime, on December 15, 1993, the U.S. District Court for the District of Puerto Rico vacated our Opinion and Order bifurcating the issues and ordered us to

abstain from ruling, as the matter was best left to the State Courts. We then vacated the trial date, scheduling instead a status conference. Debtor requested the continuance of the status conference. Hence, the status conference was held on November 16, 1994, together with a hearing to consider Debtor's request for the removal of the Trustee and the various responses thereto. We ordered the U.S. Trustee to respond to Debtor's request for removal of the Chapter 7 Trustee in writing, within ten days. We ordered the Chapter 7 Trustee to review the entire case in light of several opinions entered by the U.S. District Court for the District of Puerto Rico, upheld on appeal by the Court of Appeals for the First Circuit, and in view of the decisions entered and pending before the Superior Court of New Jersey. We stayed all matters in the Bankruptcy Court awaiting the Trustee's report and recommendation. We denied Debtor's request for the removal of the Trustee as per Opinion and Ordered entered on February 7, 1995. We noted the Trustee had not filed the report and ordered him to do so within ten days. He filed the report on February 23, 1995. The Report asks us to dismiss this case for a number of reasons discussed in the document. As per footnote order entered on the Report, we granted all parties in interest, including the Debtor, twenty days to respond and request a hearing by stating, "unless an objection is filed within twenty days, this case is dismissed." On March 15th Debtor objected to the dismissal of the case and petitioned the Court for entry of his discharge. On March 31st the U.S. Trustee filed his statement regarding the Chapter 7 Trustee's Report. The Trustee asked for and was granted two extensions of time to respond to the Debtor's position. On April 25, 1995 he filed his reply. The response to this reply was filed by the Debtor on May 8, 1995, when the issue was submitted for adjudication.

11 U.S.C. § 707(a) provides:

> "(a) The court may dismiss a case under this chapter only after notice and hearing and only for cause, including —
>
> (1) unreasonable delay by the debtor that is prejudicial to creditors; [or]
>
> (2) nonpayment of any fees [or] and charges required under chapter 123 of title 28 [28 USC §§ 1911 *et seq.*]; and
>
> (3) failure of the debtor in a voluntary case to file, within fifteen days or such additional time as the court may allow after the filing of the petition commencing such case, the information required by paragraph (1) of section 521, but only on a motion by the United States trustee."

This section sets forth three examples of "cause" which would justify the dismissal of a Chapter 7 case. However, "These examples are merely illustrative and the court may dismiss the case on other grounds when cause is found to exist."[1] Courts have found cause for dismissal based on a variety of grounds discussed in the cited section of *Colliers*. These grounds include some alluded to in the Trustee's Report: i.e., "Where judicial economy would be furthered with no substantial detriment to the debtor or the creditors, the Chapter 7 case may be dismissed. Also, a case may be dismissed if it was not filed in good faith.

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1. 4 *Collier on Bankruptcy*, Section 707.03 (15th ed.).

Bad faith may be found when the debtor has a frivolous, noneconomic motive for filing a bankruptcy petition, when there is a sinister or unworthy purpose, or when there is abuse of the judicial process."[2]

We read and considered the positions of the Chapter 7 Trustee and of the Debtor. We find there is no need for an evidentiary hearing to establish facts to support our conclusion. Facts material to the Trustee's request for dismissal are contained in his Report. We adopt these facts as our own because they are not in controversy and are amply supported by the record of this case.[3]

These facts show the Trustee has met his burden of showing there is sufficient cause to grant his request for the dismissal of this case pursuant to 11 U.S.C. § 707(a). Cause for this dismissal is enunciated by the Trustee in his Report which we again adopt as our own reasons for granting the dismissal of this case.

Lastly, we note the United States District Court for the District of Puerto Rico has repeatedly stated this case is but "another chapter in the epic struggle of the alleged debtor to escape the consequences of his prior actions and decisions. In a related action involving the same parties, *In Re Unanue-Casal*, 159 B.R. 90 (D.P.R. Aug. 3, 1993), we decided in favor of the

---

2. *Ibid.*

3. For example, the Trustee states there is no cash to pay for continuing expensive litigation; there are no Claimants other than those involved in the family dispute amply documented in our opinions and those of the U.S. District court cited above; there are no assets which can be converted to cash as per Debtor's own disclosure and the Trustee's Report; the family dispute is still pending before the State Courts of New Jersey and Puerto Rico because opinions entered are not final or unappealable.

appellants above. We do so again, because we remain convinced that debtor's bankruptcy petition is a ruse designed to frustrate the legitimate rights of his adversaries."[4]

WHEREFORE, the Trustee's motion to dismiss this case is granted. We retain jurisdiction to dispose of the funds deposited with the Clerk. The Chapter 7 Trustee is discharged and his bond is cancelled.

The Clerk is ordered to enter a judgment accordingly in the docket of the case and of adversary proceeding 91-0099, vacate any hearing dates, and close both the case and the adversary proceeding forthwith.

GIVEN, in San Juan, P.R., this 12th day of September, 1995.

[signed]
SARA DE JESÚS
U.S. BANKRUPTCY JUDGE

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4. *In re Unanue-Casal*, 164 B.R. 216, 217 (D.C.P.R. 1993), *aff'd*, 32 F.3d 561 (C.A. 1st Cir. 1994); *cert. denied*, 115 S.Ct. 1098 (1995). The U.S. District court for the district of Puerto Rico in another published opinion stated:

"[I]t appears to be common knowledge that the Debtor is not bankrupt. Yet, the Debtor's true financial worth has remained a mysteriously shrouded fact. Therefore, any interference with the Bankruptcy proceeding by lifting the automatic stay would be irrelevant because the Debtor does not need the protection of the bankruptcy court. . . .

"There is also evidence that the Debtor's petition for bankruptcy is a sham, because he is not 'financially distressed.' . . . We are convinced the Debtor acted in bad faith when he filed for bankruptcy." *In re Unanue-Casal*, 159 B.R. 90, 99, 102 (D.P.R. 1993), *aff'd mem.*, 23 F.3d 395 (1st Cir. 1994).

Supreme Court, U.S.
FILED
MAR 23 1999
OFFICE OF THE CLERK

No. 98-1231

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1998

THE BANKRUPTCY ESTATE OF ULPIANO UNANUE-CASAL,
a/k/a CHARLES UNANUE,
Petitioner,

v.

GOYA FOODS, INC., JOSEPH UNANUE,
FRANK UNANUE *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To The
Supreme Court of The State Of New Jersey

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Petitioner respectfully submits this Reply Brief in Support of the Petition for a Writ of Certiorari to review the judgment of the Supreme Court of the State of New Jersey issued on November 5, 1998 and the decisions below.

JURISDICTION

In Respondents' Brief in Opposition, it is stated that if this Court has jurisdiction, it is pursuant to 28 U.S.C. § 1257(a) rather than 28 U.S.C. § 1254(1). Petitioner acknowledges in reply that this Court's jurisdiction is indeed pursuant to 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE IN REPLY

Supreme Court Rule 15.2 notes that counsel have an obligation to the Court to point out in the brief in opposition any perceived misstatements made in the petition. In keeping with the apparent intent of that rule, counsel for the Petitioner addresses hereinafter statements in the brief in opposition which could be considered as misstatements in that they have the capacity to lead the Court to an incorrect understanding of the events and procedure below.

At page 2 of the Opposition Brief the Respondents assert that Charles Unanue, not the bankruptcy estate, is the petitioner. They also assert at page 7 of the Opposition Brief that the trustee of the bankruptcy estate was only a "nominal party" below. These assertions are highly inaccurate.

Contrary to the Respondents' characterization of the role of the trustee, the judgment below was clearly entered at the Respondents' behest against the bankruptcy estate, as well as Charles Unanue individually. Thus, the Respondents recognized that Charles Unanue and the bankruptcy estate were two different entities.

That the bankruptcy estate was the sole party to the action at the time of judgment is made clear by the trial court's order, entered with Respondents' consent, pursuant to which the bankruptcy estate was substituted into the case as the sole defendant and Charles Unanue, individually, was substituted out.

Moreover, the interests of Charles Unanue and the trustee of the bankruptcy estate were different, even to the extent that they were litigants against each other in an adversary proceeding before the bankruptcy court.

Notice of appeal from the trial court judgment was filed on behalf of the bankruptcy estate. Charles Unanue also filed a notice of appeal on behalf of himself. Before the Appellate Division of the New Jersey Superior Court, a motion was made on behalf of the bankruptcy estate to consolidate the two appeals. That motion was denied by the court, and this case has thereafter proceeded in accordance with that denial as two separate appeals.

It is therefore disingenuous for either the Appellate Division of the New Jersey Superior Court (10a–11a) or the Respondents (Opposition Brief, pp. 2-3, n. 2) to criticize the existence to two separate appeals and petitions for a writ of certiorari.

Respondents further inaccurately state, at page 7, note 6 of the Opposition Brief, that Charles Unanue instructed counsel for the bankruptcy estate not to appear in response to the Respondents' summary judgment motion. Not only is there no reference to the record for any such instruction, but the assertion ignores the fact that the client in this matter that was entitled to instruct counsel was the trustee of the bankruptcy estate, not Charles Unanue. That the trustee did not appear in response to the motion in person or by counsel was a determination that could only have been made by the trustee.

The Respondents have compounded their inaccuracy with inconsistency. While conceding that the trustee was not represented at the hearing on the Respondents' summary judgment motion, the Respondents also assert at page 8 of the Opposition Brief that "all parties (including Petitioner) had briefed and orally argued" the motion before the trial court. In reality, as the Respondents conceded, the trustee was not present, either in person or by counsel. Rather than "all parties" having briefed and argued the motion, the only parties to have done so were the Respondents – *i.e.*, the trustee was not present, and Charles Unanue was not then a party. He was present at the hearing only because the court ordered him to appear.

The Respondents assert as a fact that the courts below found that Prudencio Unanue was domiciled in New Jersey commencing in 1929. (Opposition Brief at pp. 3, 6). The trial court did not so find, but was careful to only hold that as of November 16, 1970 (92a) and March 17, 1976 (93a) he was so domiciled. There was no other finding as to any change of domicile by Prudencio to New Jersey, nor was there any finding of domicile of the conjugal

partnership which was the exclusive owner of the assets acquired during the marriage of Prudencio and Carolina.

The Respondents' assertion at page 4 that Prudencio's estate plan was unchallenged for eleven years after his death is misleading in that Charles Unanue had no knowledge of the New Jersey probate proceedings until 1987 or that assets of his parents' conjugal partnership had been placed in a trust and disposed of in violation of 31 L.P.R.A. §§ 2361, 2362, 2367, 2368, 3621, 3624, 3672, 3673 and 3697.

The Respondents' reference at page 4 of the Opposition Brief to "community property laws" of Puerto Rico severely and materially misstates the applicable Puerto Rican law. The legal effect of the entity known as the conjugal partnership is not the same as the existence of community property. Unlike the theory of community property in which the marital assets are owned by one or both of the spouses subject to the rights of the other spouse, the conjugal partnership is a distinct entity having its own citizenship and capable of suing and being sued in its own right. See, *Fernandez-Cerra v. Commercial Ins. Co. of Newark*, 344 F. Supp. 314 (D.P.R. 1972). The conjugal partnership, not the spouse, is the sole owner of all assets acquired during the marriage – even property located in jurisdictions that do not adhere to the doctrine of conjugal partnership. *Sanchez v. Bowers*, 70 F. 2d 715 (2d Cir. 1934). Characterizing the Petitioner's arguments as involving community property laws is most misleading, as under the laws of conjugal partnerships, Prudencio never, as administrator of the conjugal partnership pursuant to 31 L.P.R.A. § 284, had anything other than nominal title to the stock of Goya which was acquired during his marriage.

Respondents' assertion at page 4 that Charles Unanue's forced heirship claims are solely dependent upon Prudencio's domicile are also misleading. As a person born in Puerto Rico, Charles Unanue was a forced heir of Prudencio and Carolina and entitled to his share of their estates under the laws of Puerto Rico pursuant to 31 L.P.R.A. §§ 2361, 2362, 2363 and 2367.

Respondents assert at page 6, note 5, that Prudencio was confined to a small apartment in Puerto Rico. The testimony of the treating physicians all established that Prudencio could have traveled to New Jersey had he so desired, just as the clear evidence established that he went to work at the cannery virtually every day between his hospital discharge in June 1971 and his stroke in January 1972. The testimony also described the apartment as a large, three bedroom, two bathroom apartment with maid's quarters in a luxury condominium building overlooking the beach in the affluent Condado section of San Juan.

The Respondents euphemistically state that the attorneys fees that were awarded were authorized by an express provision of the 1974 Amendment. The provision was not, as one might assume, one for an award of attorneys fees as compensation. Rather, as the agreement makes clear and as the court found, the provision was a penalty clause that measured the penalty at twice the attorney fees and costs payable by the unsuccessful party in litigation on any matter whatsoever, irrespective of who initiated the action. Even though contractual penalty clauses are illegal under any of the arguably applicable

laws[1], judgment was entered in purported reliance on the unlawful clause.

As to the dismissal of the bankruptcy proceedings, Respondents would lead the Court to believe (at page 9 of the Opposition Brief) that all assets and liabilities of the bankruptcy estate reverted to Charles Unanue upon the dismissal, and that Petitioner's counsel so acknowledged. However, the statement of Petitioner's counsel was that the assets reverted to Charles Unanue, not that the liabilities of the estate also revert. As stated in 1999 Bankruptcy Code, Collier Pamphlet Edition, Part 1 (Matthew Bender, 1998) at page 199 (citing House Report No. 95-595, 95th Cong. 1st Sess. 337-38 (1977) and Senate Report No. 95-989, 95th Cong., 2d Sess. 48-9 (1978)):

> The basic purpose of [11 U.S.C. § 349(b)] is to undo the bankruptcy case, as far as practicable, and to restore all property rights to the position in which they were found at the commencement of the case. * * * Where there is a question over the scope of the subsection, the court will make the appropriate orders to protect rights acquired in reliance on the bankruptcy case.

Respondents are also incorrect in asserting at page 9, note 7, that both the bankruptcy court and the district court concluded that Charles Unanue's bankruptcy was

[1] *Jarro Building Industries Corp. v. Schwartz*, 281 N.Y.S.2d 420 (2d Dep't 1967) (New York law); *Monsen Engineering v. Tami-Githens, Inc.*, 219 N.J. Super. 241 (App. Div. 1964) (New Jersey law). If assessed under Puerto Rican law, the entire agreement is an unlawful waiver of a future inheritance. 31 L.P.R.A. § 3421.

fraudulent. The bankruptcy court found that the allegations against Charles Unanue of misconduct were unfounded. On a renewed motion the bankruptcy court dismissed the Respondents' claims at the close of their proofs. It was only the district court, on appeal from the dismissal and without Charles Unanue having been afforded the opportunity to introduce evidence, that issued the statement that "common knowledge" was the basis for concluding that the bankruptcy was filed in bad faith. The Respondents thus rely upon such "judicial notice" of common rumor to support the assertion that the bankruptcy was fraudulent.

In the same footnote, Respondents allege that the District Court found that Charles Unanue fraudulently hid assets in the name of his wife to defraud creditors. However, the District Court made no such finding. Instead, it found that Charles Unanue's wife, an individual (as distinct from a corporation) is his alter ego and therefore responsible for his debts. See, *Goya Foods, Inc. v. Unanue-Casal*, 982 F. Supp. 103 (D.P.R. 1997), appeals docketed, Nos. 98-1553, 98-1554 (1st Cir). Their appeals are pending.

I

THE STATUTE CITED BY PETITIONER, 48 U.S.C. §733a, ESTABLISHES THE DOMICILE OF PRUDENCIO UNANUE

Respondents argue that 48 U.S.C. § 733a has been held to equate residence with domicile. The leading cases from the courts of Puerto Rico which have so held, *Fiddler v. Sec. of the Treasury*, 85 P.R.R. 302 (1962) and *Buscaglia v. Tax Court*, 68 P.R.R. 322 (1948), did so without any

analysis of the statute or its legislative history. Any persuasiveness of these opinions is undercut by their complete failure to take into account Congress' deliberate abandonment of "domiciled" as the basis for Puerto Rican citizenship and it clear use of the lesser term "resided."

Respondents argue that the legislative history should not be considered because the statute is unambiguous. Petitioner asserts that the use of the word "resided" is indeed unambiguous – that it means what it says, *i.e.*, "resided" rather than "domiciled." By arguing that "resided" means "domiciled," Respondents at best create an ambiguity which is properly resolved by considering Congress' express rejection of "domiciled" in favor of the statutory provision of "resided."

Respondents also contend that a determinative decision by this Court of the effect of § 733a is unnecessary because this statute is not likely to affect anyone other than Charles Unanue at any time. However, it is clear that the determination of how a United States citizen becomes a Puerto Rican citizen has wide ranging, daily consequences for every United States citizen that resides in Puerto Rico from voting, to taxes, to education, to public benefits and entitlements.

II

THE LAWS OF PUERTO RICO ARE APPLICABLE UNDER THE FULL FAITH AND CREDIT CLAUSE

Respondents assert, at page 18, that Puerto Rico's laws are irrelevant because of the finding below that Prudencio was domiciled in New Jersey. As set forth in the

Petition, Prudencio was domiciled as a matter of law in Puerto Rico and hence Puerto Rican statutory law governs as all the relevant contacts involve Puerto Rican citizens and entities, the assets held by them, and contracts signed, notarized and performed in Puerto Rico.[2] But putting aside the domicile of Prudencio, there remains the clear Puerto Rican domicile of the conjugal partnership – a separate *de jure* entity created and existing under Puerto Rican law. It is this entity which owned the assets that Prudencio and Carolina acquired during their marriage, including the stock of Goya issued in Prudencio's name but paid for by Carolina.

To disregard the law of Puerto Rico with respect to conjugal partnerships, as Respondents urge should be done, is to empower one spouse to readily avoid the existence of this legal entity and the rights and obligations flowing therefrom simply by relocating one's self to New Jersey. Not only would this have wide-reaching effects for all marriages entered into under this international legal precept of civil law, but it sets a dangerous precedence for the wholesale disregard for another state's body of law governing other *de jure* entities such as business partnerships. For example, the floodgates are now open for states such as New Jersey to disregard the legal existence of a Massachusetts business trust simply because the forum does not itself provide for the creation and existence of such an entity.

Respondents assert that there is a well-settled conflicts of law principle establishing that the law of the place of domicile of spouses at the time of an acquisition of

[2] Thus, the arguments raised by Respondents in footnote 9, page 14, are irrelevant.

property governs. However, this principle applies only to jurisdictions in which one or both of the spouses is an owner of the property. In conjugal partnership jurisdictions, the owner of the property is the conjugal partnership itself, in this case a legally separate entity created in Puerto Rico and governed by its partnership laws. In addition, Respondents' argument fails because, as previously noted, the courts never found that Prudencio was domiciled in New Jersey at the time he acquired the stock of Goya.

CONCLUSION

For the reasons stated above, Petitioner respectfully requests that this Court issue a writ of certiorari to review the decisions of the New Jersey courts below.

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